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THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: INTERNATIONAL ORGANIZATIONS AND TRIBUNALS

By G. G. FITZMAURICE, C.M.G.
Principal Legal Adviser to the Foreign Office

Introductory

THE present article constitutes the third and final part of a study of the jurisprudence of the International Court of Justice up to 31 March 1951,[1] the first part of which (General Principles and Substantive Law) appeared in this *Year Book*, 27 (1950), and the second part (Treaty Interpretation and other Treaty Points) in this *Year Book*, 28 (1951). This completes a first cycle covering the findings of *general* interest from the standpoint of international law and practice[2] given by the Court (and by individual Judges).[3] A second cycle will deal (under the same principal headings) with subsequent pronouncements of general interest up to 31 March 1954, and will cover the cases of *Reservations to the Genocide Convention*, *Asylum* (final phase), *Norwegian Fisheries*, *Anglo-Iranian Oil*, *United States Interests in Morocco*, *Ambatielos*, and *Minquiers and Ecréhous*, and any other decisions or advisory opinions which may be given up to that date.

This part of the study is mainly concerned with the pronouncements of the Court relative to the United Nations Organization and the Charter, and to its own competence and procedure. Some of these pronouncements are chiefly relevant only to the United Nations (e.g. as to the admission of new Members, the exercise of the veto, the status of recommendations, &c.); but others involve wider questions, of application to all international organizations (e.g. international personality, powers, the status of international officials, &c.). Similarly, some part of the Court's findings in regard to its own competence and procedure is of wider application, and relevant to the position of international tribunals generally.

The subject of international organizations is dealt with under three main divisions, comprising first, some questions fundamental to all international

[1] The cases covered are the *Corfu*, *Asylum* (earlier phases), *Injuries*, *First* and *Second Admissions*, *South-West Africa*, and *Peace Treaties* cases.

[2] See this *Year Book*, 27 (1950), p. 1, for a statement of the scope and limits of the present study, which is not intended to provide any systematic analysis or critique of the various decisions or opinions of the Court, as *such*, but to abstract from them the points that have a general legal interest.

[3] See ibid., pp. 1–2, for an explanation of the considerable part assigned in this study to the views expressed by individual Judges, in addition to those embodied in the majority findings of the Court as such.

organizations; secondly, international claims by such organizations; and thirdly, a number of specific points peculiar to or having arisen mainly in connexion with particular provisions of the United Nations Charter. The Chapter on the Court deals first with questions of jurisdiction and competence, and secondly with particular points of procedure.

CHAPTER I

INTERNATIONAL ORGANIZATIONS, WITH PARTICULAR REFERENCE TO THE UNITED NATIONS AND THE CHARTER

Division A: Some Fundamental Questions

§ 1. International Personality

(*a*) *International personality is a necessary attribute of any international organization having a personality distinct from that of its members and possessed of functions, duties, and rights, which could not otherwise be carried out.* As noticed in the first part of the present study (see this *Year Book*, 27 (1950), pp. 3–4), the Court found in the *Injuries* case that international personality (which alone permits of action on the international plane) was not the sole prerogative of states and could be possessed by international organizations such as the United Nations. The Court gave a partial definition of international personality, and found (*I.C.J. Reports*, 1949, 178) that the United Nations Organization possessed such personality in the sense of that definition, i.e. not as being a state or 'super-State' but as being 'capable of possessing international rights and duties', as having 'capacity to maintain its rights by bringing international claims', and as 'an entity capable of availing itself of obligations incumbent upon its Members'.

It does not follow that every international organization must be taken to possess such personality.[1] In order to arrive at the conclusion that the United Nations did, the Court examined the Charter and found that under it the Organization was not 'merely a centre for harmonizing the actions' of its individual Member states. It had set up the Organization as an entity separate from the individual Members. Under various Articles of the Charter, the Members owed duties not merely to each other but to the Organization as a whole, and as such. The Organization, for its part, and as such, was under certain duties to the Members—for instance, 'to remind them, if need be, of certain obligations' (loc. cit. 179). In addition, the Charter provided for the conclusion of agreements between the Organization and its Members, and in fact such agreements had been concluded

[1] In fact most of the major ones, particularly the Specialized Agencies brought into relationship with the United Nations under Articles 57 and 63 of the Charter, will, on a reading of their constitutive instruments, be found to possess it.

creating rights and duties not between (or not merely between) the Members, but 'between each of the signatories [i.e. Members] and the Organization'.[1] It was 'difficult to see how such [agreements] could operate except upon the international plane and as between parties possessing international personality' (ibid.).

The Court also found (ibid. 178) that the 'progressive increase in the collective activities of States' had culminated in the establishment of the United Nations Organization, 'whose purposes and principles are specified in the Charter'; but that 'to achieve these ends the attribution of international personality is indispensable'. The conclusion accordingly was that

> 'In the opinion of the Court, the Organization was intended to exercise and enjoy and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane. It could not carry out the intentions of its founders if it was devoid of international personality. . . . It must be acknowledged that its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.
>
> 'Accordingly, the Court has come to the conclusion that the Organization is an international person.'

The international personality of international organizations is therefore established as being the necessary consequence of the possession of certain functions, duties, and rights, for the due performance and exercise of which the attribution of such personality is indispensable.

(*b*) *Effects of the international personality of international organizations*

(i) *The attributes, powers, and functions of international organizations depend on their constitutive instruments and on the development of their practice.* As already noticed (*supra*), the Court distinguished the character of the personality of the United Nations Organization from that of a state; and similarly as regards its rights and duties (loc. cit. 180):

> 'Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.'

(ii) *Position* vis-à-vis *member states.* It follows from the possession of international personality that an international organization constitutes an entity separate from and additional to its member states, and that it is not simply an aggregation of those states. It is a distinct entity with functions, rights, and duties of its own. Its duties have as their counterpart obligations owing to it by member states, the performance of which the organization has

[1] The Court instanced in particular Section 35 of the General Convention on the Privileges and Immunities of the United Nations Organization.

a right to expect and, if necessary, to require. This principle was referred to by the Court in the *Injuries* case (loc. cit. 184) as

'. . . the undeniable right of the Organization to demand that its Members shall fulfil the obligations entered into by them in the interest of the good working of the Organization. . . .'

The machinery by which the organization might assert this right *vis-à-vis* its member states is considered later (*infra*, § 4 (*b*) (i)), but the positive and practical character of the right was left in no doubt by the Court when it established the right of the United Nations Organization, as such, to bring international claims against its Members in respect of breaches of their obligations towards it (see below, Division B of this Chapter), stressing the fact that 'the effective working of the Organization—the accomplishment of its task'—required that the undertaking of Members 'should be strictly observed'. For that purpose the Court (loc. cit. 183) thought it

'. . . necessary that, when an infringement occurs, the Organization should be able to call upon the responsible State to remedy its default, and, in particular, to obtain from the State reparation for the damage that the default may have caused . . .'.[1]

(iii) *Position* vis-à-vis *non-member states*. The Court was called upon to consider this matter in the *Injuries* case, in connexion with the *capacity* of the United Nations Organization to bring a claim against a non-member state. Since the Court had found that capacity to bring an international claim depended on possession of international personality, which in turn depended on whether the existence of such personality was a necessary consequence of the functions, powers, rights, and duties of the Organization under the Charter and related instruments, the question arose whether the international personality of the Organization existed only for its member states, and whether non-members could claim that, not being parties to the Charter, the international personality of the Organization did not exist for them, and they were not bound to recognize it. On this, the Court found in effect (loc. cit. 185) that the international personality of the Organization was a question of *fact*. The result of the Charter had been

'. . . to bring into being an entity possessing objective international personality, and not merely personality recognized by [the Member states] alone . . .'.

However, the objective nature of the Organization's personality does not mean that non-member states are in the same position towards it as Members, or have the same, or any particular, obligations towards it. Clearly they have not; but the existence of international personality as an objective

[1] These observations were made with reference to the particular case of injuries caused to agents of the United Nations when on missions in the territory of member states, in circumstances involving the responsibility of the state concerned; but the underlying reasoning is quite general.

fact is nevertheless capable of producing consequences outside the confines of the Organization.

§ 2. General Powers of International Organizations

(*a*) *Implied powers.* Having found in the *Injuries* case that the Charter did not expressly confer on the United Nations the capacity to make an international claim, the Court proceeded to inquire whether 'the provisions of the Charter concerning the functions of the Organisation' *implied* such a capacity, and found (*I.C.J.*, 1950, 182) that

'Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.'

In support of this principle, the Court cited the views regarding the International Labour Office expressed by the former Permanent Court in its Advisory Opinion No. 13 of 23 July 1926 (Series B, No. 13, p. 18) and a little later (loc. cit. 184) spoke of certain capacities for the Organization arising 'by necessary intendment out of the Charter'. These views are brought into relief by contrasting them with those of Judge Hackworth, who dissented. In his view the conclusion that powers could be conferred on an international organization by 'necessary implication' was not 'warranted under rules laid down by tribunals for filling *lacunae* in specified grants of powers'. He considered (loc. cit. 198) that

'Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted.'

Judge Hackworth thought (ibid.) that there could be

'. . . no gainsaying the fact that the Organization is one of delegated and enumerated powers. It is to be presumed that such powers as the Member States desired to confer upon it are stated either in the Charter or in complementary agreements concluded by them. Powers not expressed cannot freely be implied.'

The Court presumably felt that this doctrine (of fairly general validity in municipal and domestic law) would unduly hamper the functioning of international organizations, given their character and the impossibility of foreseeing at their birth every situation or requirement that would arise—coupled with the difficulties of amending or adding to the original constitutive instrument. Judge Alvarez in the (*First*) *Admissions* case advocated a frankly teleological principle.[1] It was his view (*I.C.J.*, 1948, 68) that

'. . . an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the

[1] See generally as to this, in the context of treaty interpretation, the second part of this study in this *Year Book*, 28 (1951), pp. 7–8.

views of those who created it, but in accordance with the requirements of international life'.

There are thus three possible views as to the general powers of an international organization, the Court's being the middle view:

(i) International organizations prima facie have the powers expressly conferred on them by their constitutive instruments, and only have such additional or implied powers as are necessary for the accomplishment of these expressed powers and no others (Judge Hackworth).

(ii) International organizations must, in addition to the powers mentioned under (i), be deemed by implication to have the ancillary powers necessary to enable them to carry out their functions and fulfil their objects and purposes as laid down in their constitutive instruments (the Court).

(iii) International organizations are not limited to what is expressed in or follows by implication from their constitutive instruments, but must be regarded as having all such powers as are necessary to enable them to 'develop' in accordance with the requirements of international life (Judge Alvarez).

(*b*) *Bearing of the political character of an international organization on its powers.* The Court had occasion to consider this matter in the (*First*) *Admissions* case, in which Judges Basdevant, Winiarski, McNair, and Read, who delivered a joint dissenting opinion, took the view—see below, Division C, § 1 (*a*) (iv)—that the political character of the United Nations Organization created for its Members a prima facie right of political appraisal, and a legal right 'to base their arguments and their vote upon political considerations' (*I.C.J.*, 1948, 85). Consequently, unless a particular provision of the Charter expressly limited this right, it must be presumed to exist and to have its full scope. The Court took a different view, not so much of principle as in relation to the particular matter before it, because it considered that although the relevant provision did not contain any express limitation on the right of political appraisal, such a limitation must in the circumstances be presumed from the general character of the provision in question (see below, ibid.). The Court, however, made the following general pronouncement showing that its view on the principle involved was very similar to that of the four-Judge minority (loc. cit. 64):

'The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment. To ascertain whether an organ has freedom of choice for its decisions, reference must be made to the terms of its constitution.'

(*c*) *Power of dissolution.* Do the inherent powers of an international organization include a power to dissolve itself and to do this through a resolution of its assembly?

In the *South-West Africa* case Judge Read made some observations on this topic. After pointing out that municipal law invariably provided means for the dissolution or liquidation of corporate bodies or other juridical entities, he went on to say (*I.C.J.*, 1950, 167):

'In the case of an international organization, and in the absence of express provisions in its charter, a legal power of liquidation arises by necessary implication. Under the Covenant, the Assembly, representing all of the Members, was clearly justified in proceeding upon the assumption that this power to liquidate could be exercised by it, and by no other organ or agency of the League.'

It must, doubtless, be possible, by one means or another, to bring international organizations to an end. But in those cases where the constitution of the organization makes no provision for the purpose, there would normally be some difference of opinion whether dissolution could be carried out by the general constituent assembly of the organization alone, using its normal voting rule, or whether the express consent of all the member states would not be required. Most constituent assemblies have a voting rule which enables them to pass resolutions by a majority vote of, say, two-thirds of the members. Can the whole organization be dissolved by such a vote, even though some of the members are not present and others perhaps actually vote against it? Judge Read seems in effect to have answered this question in the affirmative, for in a second passage (ibid.) he said:

'Any legal position, or system of legal relationships, can be brought to an end by the consent of all persons having legal rights and interests which might be affected by their termination. The Assembly, in liquidating the League, was not merely clothed with the authority conferred upon it by the Covenant. Its action, in winding up the League and the Mandates System, expressed the consent of all the Members of the League, present or absent, to the measures adopted; and waived, on their behalf, any rights or any objections that they might have raised to the course of action approved by its resolutions.'

Evidently, it may well be convenient that an institution can be brought to an end by a majority vote of its assembly, and in practice the validity of such action is unlikely to be challenged, since an institution which has come to this pass will be more or less *in extremis* and unlikely to fulfil any further useful function, even if a rump of it should theoretically be left alive. As a matter of strict law, however, it may be questioned whether a resolution of this character can be valid and effective for the purpose, unless the constitution of the organization so provides. The assembly of an international organization is given a majority voting rule for the purpose of carrying out (and facilitating) the work of the organization, not of bringing it to an end. It must therefore remain doubtful whether a majority voting rule can properly be used for the purpose of bringing about a final

dissolution. Such a vote probably only operates to dissociate the particular states supporting it, from the organization as such.

§ 3. Succession or Devolution as between International Organizations

(*a*) *Can it occur at all?* In the *South-West Africa* case a number of interesting observations were made on the question of succession or devolution of functions as between international organizations. Since the conclusions of the Court (and equally the opinions of the dissenting Judges) on the particular issue involved turned largely on the view to be taken of the effect of certain instruments and arrangements, these observations are of limited value as regards the establishment of any general principles governing the matter. They are nevertheless well worth consideration.

The Court found in effect that there had been an automatic or necessary devolution on to the United Nations of certain supervisory functions of the former League of Nations in regard to mandated territories, i.e. the right to receive, examine, and observe upon reports on such territories, which the mandatory Powers were under a corresponding obligation to furnish to the League, and hence (in view of the devolution) were now under an obligation to furnish to the United Nations, in lieu of the League. Judges McNair and Read dissented from this view, because they were unable to agree that there had been any automatic or necessary devolution. In their opinion, any succession depended on definite arrangements to that effect having been made, and in the light of the relevant instruments they did not consider that this had been done.

It is not the present purpose to discuss which of these views was correct, particularly as the issue turned largely on the effect of particular instruments, and, to that extent, raised no point of *general* legal interest. It would appear, however, that the Court's findings constitute authority for at any rate the two following general propositions:

(i) There *can* be an automatic devolution of functions from one international organization on to another in the event of the extinction of the former.

(ii) There is a presumption[1] that such a devolution occurs whenever the following conditions are fulfilled:

a. a given organization becomes extinct, but another organization intended generally to take its place comes or has come into being, having essentially the same purposes and principles, with a similar or

[1] The matter is purposely not put higher than a presumption because it is clear that in arriving at the conclusion that the rights and functions in question had devolved on to the United Nations, the Court was not proceeding on a purely doctrinal basis but was influenced by certain factual considerations relative to the character of the Mandate for South-West Africa and the effect of certain particular instruments.

analagous constitution and institutions, and carrying out broadly the same functions, in the same field;

b. the constitutive instrument of the new organization specifically authorizes or enables it to assume and carry out the functions in question.

(*b*) *Doctrine of the functional field.* On the foregoing basis, the position is comparable with that which exists in the realm of state succession when one state takes over territory from one part of the territory of another state. There is then an automatic succession or devolution of all rights and obligations locally or territorially attached to or connected with the area transferred, which pass with it. If, for the concept of territorial area, there is substituted that of functional field, then the position might be stated as follows: that just as a territorial area passing from one state to another carries with it all rights and obligations specifically appertaining to that area in a territorial manner, so a functional field 'passing'[1] from one international organization to another (in the sense that the former is extinguished but the latter is created expressly to fulfil the same general purposes, and the extinction of the former is carried out largely on that basis)[2] carries with it the rights, obligations, and functions connected with that field, and appertaining to the capacity to act in it.

(*c*) *Cases where succession or devolution occurs.* It was Judge Alvarez (*I.C.J.*, 1950, 181) who drew attention to the fact that while traditional international law concerns itself with the problem of succession as between states, it has had little to say as yet on that of succession as between international organs and institutions, and he propounded three possible cases:

(i) An international organization is extinguished and is not 'replaced' by another one. In that event no question of the devolution of specific functions can arise.

(ii) An international organization is extinguished and another *like* it is created, but without any specific indication whether the latter is in fact to replace the former. In that case there is nevertheless an automatic devolution of functions with reference to any institution of the former organization, the character and objects of which were similar to a corresponding institution set up by the new organization (e.g. the League institution of Mandates and the United Nations institution of Trusteeship).

[1] It is not necessarily relevant that there is no instrument passing the functions concerned from the one to the other organization, for even as between states territory may pass (e.g. by annexation) without any specific transfer or cession.

[2] There are even better instances of this than the former League and the United Nations; for instance, the former International Sanitary Bureau and the present World Health Organization; the former International Meteorological Office and the present World Meteorological Office; the former International Commission for Air Navigation and the present International Civil Aviation Organization.

(iii) The constitutive instrument of the new organization and related instruments may indicate in what circumstances and under what conditions the organization will take over functions appertaining to the old one. In that case these functions can only be assumed in those circumstances and under those conditions.

Judge Alvarez, and the Court itself, held in effect that the case of mandates and of the supervisory functions of the League in regard to mandated territories came under (ii) of the above heads, whereas the two dissenting Judges (McNair and Read) thought they came, if at all, under (iii). The Court admitted that these functions had never specifically been transferred to the United Nations. Nevertheless, they considered that such a transfer must be assumed to have taken place. Having found (on grounds already noticed)[1] that the Mandate as a general whole, having created a *status* for South-West Africa, survived the demise of the League, the Court went on to consider its specific incidents and found that the reporting obligations of the mandatory Power were an essential element of the system. Therefore they must be regarded as continuing. If the entity to which the reports were formerly rendered no longer existed, this did not mean that the obligation had disappeared also; and if there existed another entity fulfilling broadly similar purposes, the reports must be rendered to that entity instead. Answering the question whether the Union of South Africa was under an obligation to submit reports on South-West Africa to the United Nations, the Court said (*I.C.J.*, 1950, 136):

'Some doubts might arise from the fact that the supervisory functions of the League with regard to mandated territories not placed under the new Trusteeship system were neither expressly transferred to the United Nations nor expressly assumed by that organization. Nevertheless, there seem to be decisive reasons for an affirmative answer to the above-mentioned question.

'The obligation incumbent upon a mandatory State to accept international supervision and to submit reports is an important part of the Mandates' System. When the authors of the Covenant created this system, they considered that the effective performance of the sacred trust of civilization by the mandatory Powers required that the administration of mandated territories should be subject to international supervision. The authors of the Charter had in mind the same necessity when they organized an International Trusteeship System. The necessity for supervision continues to exist despite the disappearance of the supervisory organ under the Mandates' System. *It cannot be admitted that the obligation to submit to supervision has disappeared merely because the supervisory organ has ceased to exist, when the United Nations has another international organ performing similar, though not identical, supervisory functions.*'[2] [Italics added.]

[1] See the first part of this study in this *Year Book*, 27 (1950), pp. 8–10.

[2] The Court must not of course be taken as suggesting that *all* the functions of the former League had automatically devolved on the United Nations. That this is not so, and that in most cases specific steps had to be taken before the United Nations could or would assume such functions, is apparent from the Resolution of the General Assembly of 12 February 1946, which Judge Read discussed on pp. 172–3 of the Report. The Court's view that there had been an

§ 4. Status of International Officials

(*a*) *Independence of national allegiance in the performance of their functions*[1]

(i) *Necessity of independence from governments.* The constitutive instruments of a number of international organizations contain a provision on the lines of Article 100 of the United Nations Charter stating in terms (what must in any event result implicitly from their position as international civil servants) that members of the staff or secretariat are not to seek or receive instructions from governments or other authorities; that their responsibility is to the organization they serve; and that member states are not to seek to influence them in the discharge of this responsibility. In the *Injuries* case the Court, while declining 'to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organisation on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals', had something to say on the consequences of the special relationship existing between the international servant and his organization (*I.C.J.*, 1949, 182):

'In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organisation, and that he may count on it. To ensure the independence of the agent, *and, consequently, the independent action of the Organisation itself*, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organisation (save of course for the more direct and immediate protection due from the State in whose territory he may be). *In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter.* And lastly, it is essential that—whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent—he should know that in the performance of his duties he is under the protection

automatic succession in the present case derived from their view as to the nature and effect of the Mandate.

Having regard to the controversial and still unsettled nature of the whole question of succession and devolution as between international organizations, it should be mentioned that the dissenting Judges, McNair and Read, rejected the view that such succession could be founded on inference or implication. The former (*I.C.J.*, 1950, 159) characterized as 'pure inference' the contention 'that there had been an automatic succession by the United Nations to the rights and functions of the Council of the League in this respect'. Judge Read (ibid., 172) said:

> 'Such a succession . . . could not be based on implications or inferences drawn from the nature of the League and the United Nations or from any similarity in the functions of the organizations. Such a succession could not be implied, either in fact or in law, in the absence of consent, express or implied by the League, the United Nations and the Mandatory Power. There was no such consent.'

Judge Read's view was, additionally, founded on an application of the principle *res inter alios acta*, and his statement of the principle itself, qua principle, is both valid and interesting and has been considered in the first part of this study (this *Year Book*, 27 (1950), pp. 16–17).

[1] The recent concern in the United States about the responsibilities of international officials towards the 'Host State' have brought out the necessity of distinguishing clearly between the position of the official in his personal and private capacity, and his position in his official capacity where his duty is primarily to his organization.

of the Organisation. This assurance is even more necessary when the agent is stateless.' [Italics added.]

It will be noted that the Court attached importance to the independence of the Organization itself, and this was a logical corollary of the Court's view that the Organization had a corporate personality distinct from and transcending the sum total of its constituent Members. Clearly if, as the Court had already found (see above, § 1 (*a*) hereof), the Organization was a distinct entity to whom, as such (and not only to one another), duties were owed by the Member states, and which was 'under a duty to remind them, if need be, of certain obligations', the independence of the Organization, that is to say in effect of its officials, becomes of real juridical moment, for unless this independence exists the Organization itself will not be independent.

(ii) *Distinction between an international official's personal and official capacity.* It seems to be implicit in the Court's view as stated above, that while an international official in no way ceases to owe allegiance to his own country in his personal capacity, in his official capacity and in the performance of his functions his first and only allegiance must be to his organization; and in case of conflict this must prevail. Similarly, an international official must, in his private life, conform to the laws and regulations of the country of his official residence; but in his official capacity his duty to the organization remains.

(*b*) *Position of the Secretary-General of an international organization*

(i) *Residual power to act on behalf of the organization.* It is a fair inference from the views expressed by the Court in the *Injuries* case (though the point is not explicitly dealt with), that given the corporate character of such an Organization as the United Nations, its separate juridical personality, distinct not only from that of the individual member states but from the aggregate total of them as a body, and the fact that the Organization may have occasion to act as a protagonist *vis-à-vis* any or all of the member states (see § 1 (*a*) and (*b*) above), there must be some vehicle or organ through which it can do so. This might be argued to be the General Assembly, in which all the Members are represented, acting by a two-thirds vote. On the other hand, the Assembly is itself only an assemblage of all its Members, and the comprehensiveness of this membership would not of itself involve the competence of the Assembly to act for the Organization in its corporate capacity. Clearly in some respects competence so to act may be conferred on a particular organ by the constitutive instrument. It seems evident, for instance, that the Security Council acting under Article 42[1] of the Charter

[1] This empowers the Security Council as such to take ('it may take') military action to restore peace and security.

would be exercising the corporate functions of the Organization as such, in respect of peace and security. But there must necessarily be a residue of functions which are or may have to be exercised on behalf of the Organization in its corporate capacity, which are not specifically vested in any of its organs and which by their nature are even unsuitable to be carried out by any organ consisting of an assemblage of states. In the *Injuries* case the Court said (*I.C.J.*, 1949, 180):

'The functions of the Organisation are of such a character that they could not be effectively discharged if they involved the concurrent action, on the international plane, of fifty-eight or more Foreign Offices, and the Court concludes that the Members have endowed the Organisation with capacity to bring international claims when necessitated by the discharge of its functions.'

But this left open the question of what person or entity could act on behalf of the Organization in the matter. Article 7 of the Charter, however, establishes the Secretariat as one of the 'principal organs of the United Nations', and it would seem that in all those cases where the Organization as an entity is required or entitled to take certain action, but where no specific organ of the Organization is empowered to do so, either expressly or by necessary implication derived from its character or functions—or where its character and composition renders it unsuitable for the purpose—there must be deemed to be vested in the Secretariat acting through the Secretary-General a residual capacity to take the action in question.[1] This seems necessary in order to avoid the result that there are things which the Organization is entitled or even bound to do, but which it has no means of doing in practice. There would be general agreement, for instance, that in anything to do with legal proceedings and the making of claims, the Secretary-General must necessarily represent and act for the Organization. It may also be that in the discharge of the Organization's duty, to which the Court referred in the *Injuries* case (see § 1 (*d*) above), of reminding Member states of certain obligations owed by them to the Organization, the Secretary-General would be the appropriate, or even the only, authority that could act. Article 99 of the Charter, though strictly dealing with a special point, lends colour to this view.

(ii) *Restrictive character of these powers. Position of the Secretary-General when carrying out duties or functions conferred upon him by specific treaty clauses.* In the *Peace Treaties* case (Second Phase), the Court found as a general principle of treaty interpretation, that where a clause confers upon an international authority, such as the Secretary-General of the United Nations, a particular function, e.g. to nominate an arbitrator in a dispute,

[1] It can be expected that this power is one which any Secretary-General would exercise with great discretion, and mainly only in those cases where circumstances rendered it impossible to refer the matter to the appropriate organ of the Organization, or where none of the existing organs was appropriate.

such a clause must (*I.C.J.*, 1950, 227) 'by its very nature . . . be strictly construed and can be applied only in the case expressly provided for therein'. It would follow from this that international officials when acting or requested to act in the exercise of powers conferred on them by treaty (or by the charter of their organization) should take a conservative view of the nature and scope of their authority.

Division B: Claims by International Organizations[1]

This section is based on the findings of the Court in the *Injuries* case, in which United Nations servants or agents had suffered death or injury while on an official mission and in circumstances entailing the responsibility of the state or government in whose territory, or owing to the action of whose agents, the injury had occurred.

§ 1. Functional Basis of the Capacity of an International Organization to Bring Claims against States

According to the principles laid down by the Court in the *Injuries* case, such capacity exists where it is necessary for the adequate performance of the functions of the organization concerned. It does not automatically follow from the possession of international personality *per se*, for the Court found[2] that whereas, in the case of a state, a right to bring a claim against other states would inherently form part of its capacities, in the case of an international organization this would 'depend on its purposes and functions, as specified or implied in its constituent documents and developed in practice' (*I.C.J.*, 1949, 180). However, in the case of the United Nations Organization, its functions were of such a character 'that they could not be effectively discharged' unless the Organization were regarded as having been endowed by its Members 'with capacity to bring international claims when necessitated by the discharge of its functions' (ibid.). In this connexion, the Court pointed out the inconveniences that would result if the Organization were not regarded as endowed with a corporate capacity in the matter, and in another passage (ibid. 180–1) added:

> 'It cannot be supposed that in such an event [i.e. damage caused to the Organisation by the wrongful act of one of its own Members] all the members of the Organisation, save the defendant State, must combine to bring a claim against the defendant for the damage suffered by the Organisation.'

Equally, capacity to bring a particular class of claim would depend on this

[1] This section should be read in conjunction with that on international claims generally, in the first part of this study (this *Year Book*, 27 (1950), pp. 23–27). Both are founded on the *Injuries* case. While that case had special reference to the position of the United Nations under the Charter, most of the reasoning could be applied to other international organizations of states.

[2] See the first part of this study in this *Year Book*, 27 (1950), p. 23.

being necessary for the due discharge of some function of the Organization concerned. In the *Injuries* case the Court found that the United Nations, *qua* Organization, had the capacity to bring claims against states in two categories of cases:

(i) where, by reason of the wrongful act of the state in question, the Organization itself had suffered direct loss or damage to its property, assets, finances, or interests;

(ii) in respect of the personal loss or damage caused to or suffered by a servant or agent of the Organization in the course of his duties, arising out of such an act, and additional to any damage caused to the Organization itself by the same act.

Capacity in the first type of case was (so, in effect, the Court found) really a necessary consequence of the corporate character of the Organization and its possession of international personality, functions, and rights; but the position in regard to the second category was less obvious, for the servant or agent of the Organization would normally also be the national of some state prima facie entitled to claim on his behalf—while a claim by the Organization on his behalf might seem at first sight to be at variance with the rule, normally applicable in the case of claims made by states, that only the state of which the injured party is a national can bring a claim on his behalf. The Court met these difficulties by applying two principles already discussed in connexion with claims by states,[1] namely:

a. Protection of the servant—that the special relationship between the Organization and its servants required, for the effective discharge of the functions of the latter (and through them the discharge of the Organization's own functions), and for the effective preservation of the independence of both, that the Organization should have the capacity to extend protection to its servant, and in case of need to bring a claim on his behalf;

b. Prejudice to the Organization—that the rules concerning the nationality of claims applied only to those cases where the nationality of the injured person formed the *sole* basis of the legal wrong done to the claimant state, entitling it to make a claim, and that they did not preclude claims by entities of which the injured person was not a national where another basis justifying such a claim existed.

On the first of these points the Court began by saying (*I.C.J.*, 1949, 182):

'The Charter does not expressly confer upon the Organisation the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organisation, and the part played by its

[1] See the first part of this study in this *Year Book*, 27 (1950), pp. 24–26.

agents in the performance of those functions, imply for the Organisation power to afford its agents the limited protection that would consist in the bringing of a claim on their behalf for reparation for damage suffered in such circumstances.'

The Court then pointed out (ibid. 183) that the work of the Organization necessitated the dispatch of 'important missions to be performed in disturbed parts of the world', involving for the members of the mission 'unusual dangers to which ordinary persons are not exposed'. The circumstances might also be such that a claim for any injury done to an agent of the Organization in the performance of such a mission could not appropriately be brought by his national state—or the latter would not feel disposed to do so. Therefore (ibid.)

'Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organisation must provide them with adequate protection.

'This need of protection for the agents of the Organisation, as a condition of the performance of its functions, has already been realised, and the Preamble to the Resolution of December 3rd, 1948 . . . shows that this was the unanimous view of the General Assembly.'

Finally, the Court concluded (loc. cit. 184):

'Upon examination of the character of the functions entrusted to the Organisation and of the nature of the missions of its agents, it becomes clear that the capacity of the Organisation to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter.'

The Court had next to consider what—as distinct from the *capacity* of an international organization to make a claim if grounds for it existed—would be the legal foundation of such a claim, i.e. of the responsibility of a state to an international organization for an injury or wrong done to one of its agents. This will now be discussed.

§ 2. Legal Foundation of a Claim by an International Organization against a State as Distinct from its Capacity to make a Claim

(*a*) *The foundation of an international claim by an international organization is a breach of an international obligation owed to the organization. In bringing such a claim the organization invokes its own right. The nationality of the injured party is irrelevant.* The Court found that, as in the case of claims by states, the foundation of any international claim by an international organization must be a breach of an obligation owed to it on the international plane by the defendant state[1] (*I.C.J.*, 1949, 180):

'It cannot be doubted that the Organisation has the capacity to bring an international claim against one of its Members which has caused injury to it by a breach of its

[1] Only international claims are here in question. Remedies in the municipal courts of the defendant state are another affair.

international obligations towards it. . . . As the claim is based on the breach of an international obligation on the part of the Member held responsible by the Organisation, the Member cannot contend that this obligation is governed by municipal law, and the Organisation is justified in giving its claim the character of an international claim.'[1]

This, coupled with the implications already noticed (see § 1 above) resulting from the special relationship between the organization and its servants or agents, explained why the absence of the nationality link did not preclude a claim by the organization, not merely for the loss or damage caused to itself, but in respect also of the personal loss or damage caused to the servant or agent himself (loc. cit. 181–2):

'. . . Only the party to whom an international obligation is due can bring a claim in respect of its breach. This is precisely what happens when the Organisation, in bringing a claim for damage suffered by its agent, does so by invoking the breach of an obligation towards itself. Thus, the rule of the nationality of claims affords no reason against recognizing that the Organisation has the right to bring a claim for the damage [caused to the agent personally]. On the contrary, the principle underlying this rule leads to the recognition of this capacity as belonging to the Organisation when the Organisation invokes, as the ground of its claim, a breach of an obligation towards itself.'

The Court continued:

'The question . . . presupposes that the injury for which the reparation is demanded arises from a breach of an obligation designed to help an agent of the Organisation in the performance of his duties. It is not a case in which the wrongful act or omission would merely constitute a breach of the general obligations of a State concerning the position of aliens; claims made under this head would be within the competence of the national State and not, as a general rule, within that of the Organisation.'

The Court's thinking is here very compressed. The problem evidently is to see why, in bringing a claim in respect of a breach of an international obligation due to itself, the organization should be able to do anything more than claim for the damage caused directly to itself, *qua* organization, and why it should be entitled also to make a claim on behalf of the agent personally. The national state of the injured party can do this because it is held itself to have suffered injury in the person of its national[2] and because it has suffered a breach of the general obligation of states to one another under international law to afford certain treatment to aliens in their territory. Can an international organization equally be held to have suffered an injury in the person of its agent or servant, and if so, what is the international obligation owed to it the breach of which gives rise to this injury?

[1] The view that this could be an obligation arising out of a general rule of international law and not necessarily out of the organization's constitutive instrument seems to have been implicit in the Court's finding (see below, § 4) that an international organization could bring an *international* claim even against a non-member state (since such a state, not being a party to the organization's constitutive instrument, would owe it no obligations except such as might arise from general principles of international law).

[2] According to the classic doctrine: see this *Year Book*, 27 (1950), p. 24.

This, as the Court said, must be something other than the general international law obligation to afford certain treatment to aliens. The answer appears to be (see above, § 1) that the nature, functions, and requirements of an international organization normally make it necessary that its agents should be able to look to it (and not to any state, even their national state) for protection and for the preferment of personal claims on their behalf arising out of any wrong or injury done to them in the course of carrying out their duties on behalf of the organization. On the question of what was the obligation to the United Nations Organization the breach of which gave rise to a right to make such a claim, the Court found that a duty of affording protection to agents of the Organization in the performance of their functions arose as a general inference both from the Charter and certain related instruments, and from particular provisions (loc. cit. 183):

'For this purpose [i.e. protection of agents], the Members of the Organisation have entered into certain undertakings, some of which are in the Charter and others in complementary agreements. The content of these undertakings need not be described here; but the Court must stress the importance of the duty to render to the Organisation "every assistance" which is accepted by the Members in Article 2, paragraph 5, of the Charter. It must be noted that the effective working of the Organisation—the accomplishment of its task, and the independence and effectiveness of the work of its agents—requires that these undertakings should be strictly observed. For that purpose, it is necessary that, when an infringement occurs, the Organisation should be able to call upon the responsible State to remedy its default, and, in particular, to obtain from the State reparation for the damage that the default may have caused to its agent.'

A breach of an obligation to the Organization being thus involved, the Organization was (as in the case of the national state of an injured party) invoking its own right in making the claim, even though the claim was in respect of personal damage to the agent or his dependents (loc. cit. 184):

'The obligations entered into by States to enable the agents of the Organisation to perform their duties are undertaken not in the interest of the agents, but in that of the Organisation. When it claims redress for a breach of these obligations, the Organisation is invoking its own right, the right that the obligations due to it should be respected. On this ground, it asks for reparation of the injury suffered. . . . In claiming reparation based on the injury suffered by its agent, the Organisation does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organisation.

'Having regard to the foregoing considerations, and to the undeniable right of the Organisation to demand that its Members shall fulfil the obligations entered into by them in the interest of the good working of the Organisation, the Court is of the opinion that, in the case of a breach of these obligations, the Organisation has the capacity to claim adequate reparation, and that in assessing this reparation it is authorised to include the damage suffered by the victim or by persons entitled through him.'

(*b*) *Claims on behalf of international officials who are nationals of the defendant state.* In addition to finding that the right of the Organization to bring

a claim was not affected by the absence of any tie of nationality between the Organization as claimant and the injured party, the Court also found as a logical corollary that the right to claim was equally not affected even if the injured party possessed the nationality of the *defendant* state (loc. cit. 186):

'The ordinary practice whereby a State does not exercise protection on behalf of one of its nationals against a State which regards him as its own national, does not constitute a precedent which is relevant here. The action of the Organisation is in fact based not upon the nationality of the victim but upon his status as agent of the Organisation. Therefore it does not matter whether or not the State to which the claim is addressed regards him as its own national, because the question of nationality is not pertinent to the admissibility of the claim.

'In law, therefore, it does not seem that the fact of the possession of the nationality of the defendant State by the agent constitutes any obstacle to a claim brought by the Organisation for a breach of obligations towards it occurring in relation to the performance of his mission by the agent.'

This finding could be elaborated as follows. The reason why, as between states, a claim cannot be made against a state alleged to have wronged an individual who is a national of that state (though he is also a national of the would-be claimant state), is that as between the defendant state and the injured party nothing has occurred on the international plane, and therefore nothing which could give rise to an *international* claim.[1] In the territory of a state of which the individual concerned is a national, or *vis-à-vis* its government, and irrespective of any other nationality he may possess, anything done to or respecting him by that state or government constitutes action on the domestic plane. Consequently, the indispensable condition of an international claim, namely, the breach of an international obligation towards the claimant state, is lacking, for since the injured party is not an alien or foreigner *vis-à-vis* the defendant state, the latter cannot have committed any breach of the rules of international law concerning the treatment of aliens, and it is the breach of these rules which normally gives rise to a claim on behalf of individuals. The position is different where the basis of the claim is not an obligation relative to the treatment of foreigners as such, but an obligation that does not depend on the nationality of the injured party, e.g. of a clause in a treaty designed (as are minorities or human rights clauses) for the express purpose of protecting local nationals against certain kinds of treatment at the hands of their own government. In such cases, the claim is not based on the injury suffered by the claimant state in the person of its national, arising out of a breach of the general

[1] Here it is assumed that no *treaty* right of the claimant state is involved, nor any general legal right based on some consideration other than the nationality of the injured party, e.g. a breach of diplomatic privilege committed in respect of someone in the service, though not having the nationality, of the claimant state.

international law obligation to treat foreigners in a certain way. It is based on a separate (treaty) right, that exists independently of any question of the nationality of the private parties in connexion with whom the matter has arisen. It is the same with claims by an international organization for an injury done to one of its agents in the performance of his functions. The claim is not based on any breach of the general international law obligation to treat foreigners in a certain way. It is based on a breach of certain obligations to the organization on the part of member states arising under or in consequence of the terms of its constitutive instrument, or sometimes by analogy with general rules of international law.

§ 3. Conflicts of Claims

In the *Injuries* case, the question arose of reconciling the claim of the international organization on behalf of its agent and any claim made by his national state arising out of the same events. The Court found in effect that there was nothing special to reconcile, since the problem was not a new one (*I.C.J.*, 1949, 186):

'International tribunals are already familiar with the problem of a claim in which two or more national States are interested[1] and they know how to protect the defendant State in such a case.'

Just as two states the nationality of both of which the injured party possesses, have an equal right, in principle, to bring a claim,[2] so in the case of an international organization and a national state both entitled to claim (loc. cit. 185)

'. . . there is no rule of law which assigns priority to the one or to the other, or which compels either . . . to refrain from bringing an international claim.'

§ 4. Claims against Non-member States

(*a*) *Capacity of an international organization to make such a claim.* The Court found that in principle the United Nations Organization had *capacity* to bring an international claim against non-member states in respect of injuries done to its agents. This resulted from the international personality of the Organization which, though in origin the creation of the Charter, existed as an independent objective *fact*, and therefore existed *vis-à-vis* non-members also, together with the attributes and incidents deriving from the Charter and from the character and functions of the Organization as thereby created (loc. cit. 185).

[1] E.g. the case of a dual national, where a claim is brought by both his national states against a third state alleged to have injured him.

[2] But they may not, and almost certainly will not, have an equal right to recover the same amount of *damages*. The degree of actual connexion of the injured party with each of the states concerned, apart from the technical possession of its nationality, must affect the estimate of the extent to which that state has in fact suffered damage in his person.

'On this point, the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power . . . to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.'

The Court was here basing itself on fundamentally the same principle of law as that discussed above under the head of 'Status and Contract' in the first part of this study.[1] The personality and capacities of the Organization have their origin in an instrument contractual in form, but once created and established they come to assume an objective, self-existent character, effective for all the world.

(*b*) *Foundation of any claim against a non-member state*

(i) *Absence of any general foundation for such a claim.* The finding of the Court on the topic of claims against non-member states related solely to the *capacity* of the United Nations Organization to make such a claim, and not to the basis on which such a claim could be brought. The Court carefully disclaimed any intention of going into the circumstances in which a non-member state could be said to be in breach of an obligation towards the Organization, giving rise to a claim. In point of fact, while, on the Court's view, the Organization has *capacity* to bring a claim against a non-member state, where a claim exists, it may not be immediately apparent, in view of the Court's other findings, how any basis for such a claim could normally exist: for the Court was careful to emphasize (see above, *passim*) that the whole legal basis of a claim by the Organization was the breach of an obligation due to it. But, *ex hypothesi*, non-member states do not have any specific obligations to the Organization. Whereas the Government of a member state which, for instance, fails to afford adequate protection to an agent of the United Nations Organization present in its territory on the business of the Organization, may be in breach of its obligation under Article 2, paragraph 5, of the Charter to 'render every assistance' to the Organization, no such general duty exists for non-member states. The Court was, moreover, careful to say (see above, Division A, § 1 (*b*)) that the possession of international personality by the Organization did not carry with it the 'totality of international rights and duties recognized by international law' but only such as derived from 'its purposes and functions as specified or implied in its constituent documents and developed in practice' (*I.C.J.*, 1949, 180). None of this could of itself involve any obligations by or rights against non-member states.[2]

(ii) *Possible foundation in particular cases.* Despite the absence of any general foundation for claims against non-member states on account of the absence of any specific duties owed by them to the organization concerned,

[1] This *Year Book*, 27 (1950), pp. 8–10.

[2] See, however, p. 17, n. 1, above.

such a foundation may well exist in particular cases. For instance, a non-member state may be a party to a treaty conferring functions on the organization out of which a claim by the latter against the non-member state might arise.[1] Or again, a non-member state might have received an agent of the organization into its territory in circumstances implying agreement on its part to be bound, in the treatment of the agent, by the same obligations as are incumbent on member states. In some cases the rules of general international law may apply by analogy.

Division C: Particular Points in Connexion with the Charter of the United Nations

§ 1. Admission of New Members

(*a*) *Conditions of Admission*

(i) *Is there any legal right of admission to the United Nations for any state which fulfils the conditions specified by Article 4, paragraph 1, of the Charter?* Article 4, paragraph 1, of the Charter provides that membership in the United Nations is 'open' to all 'peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.' Since the question whether these conditions are fulfilled is one partly of fact and partly of judgment or appraisal, it is clear that no state can *claim* admission as of right. This has usually been recognized even by those who favour ease of admission. Thus Judge Azevedo in the (*First*) *Admissions* case (*I.C.J.*, 1948, 77), said that even if 'the notion of an obligation in favour of third parties should be applied by analogy', it was not a question simply of a faculty to adhere to the Charter. There had to be a request by the applicant and, as Judge Azevedo pointed out (ibid.), even if this request

'. . . is founded on the existence of the qualifications required by the Charter, the candidate cannot himself judge whether the conditions are fulfilled in conformity with Article 4. This is the task of the Organisation, which may, or may not, accept the proposal by a judgment which it alone can render. . . . Therefore it is not a question of right, but simply of interest . . .'.[2]

In fact, since in any given case fulfilment of the Charter requirements for admission depends on the judgment of the Organization that they are

[1] Article 21 and Annexes VI–VIII of the Italian Peace Treaty, 1947, afford examples of functions conferred on the Organization by a treaty to which non-member states are parties.

[2] Judge Alvarez thought, however, that there was an actual right. In the (*First*) *Admissions* case he said (*I.C.J.*, 1948, 71) that all states fulfilling the Charter requirements had a right to membership, the exercise of which could not be blocked by the imposition of other conditions. In the (*Second*) *Admissions* case he said (*I.C.J.*, 1950, 21);

'It is consistent with the spirit of the Charter by the terms of which the United Nations Organization has a universal role . . . that all members of the international community which fulfil the conditions laid down in Article 4 should be admitted to the United Nations; these States have a *right* to be admitted.'

fulfilled, the question posed at the head of the present paragraph cannot really arise, at any rate in that form. But in another form the Court gave what was, indirectly, an affirmative answer to the question, by establishing in effect that it was contrary to the Charter, and therefore illegal, to refuse admission to states considered to fulfil these requirements. This leads to the next question.

(ii) *Is there a legal obligation for member states to admit an applicant that fulfils the necessary conditions?* This question is equally seen to be wrongly posed, seeing that the applicant cannot be said to fulfil the conditions until the Members have decided that it does, since some of them are subjective, depending on 'the judgment of the Organisation'; and if the Organization or any organ of it entitled to a voice in the matter (see Article 4, paragraph 2, of the Charter) rejected the application, the presumption would necessarily be that in the judgment of the Organization the requisite conditions were not fulfilled—and this leads to the actual question put to the Court in the (*First*) *Admissions* case:

(iii) *Is a member state entitled to reject an applicant on grounds other than those specified in Article 4, paragraph 1, of the Charter?* More accurately, can a Member state make its acceptance of an applicant dependent on conditions other than those specified in this provision, and in particular on the simultaneous admission of some other applicant? The Court answered this question in the negative, finding (*I.C.J.*, 1948, 65) that the member state

> '. . . is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided by paragraph 1 . . . in particular, a Member . . . cannot, while it recognizes the conditions set forth in that provision to be fulfilled subject its affirmative vote to the additional condition that other States be admitted to membership . . . together with that State.'

(iv) *The sense in which membership is 'open' to applicant states fulfilling the necessary conditions.* There is an evident ambiguity in the term 'open' in Article 4. It could mean that the conditions specified are simply the indispensable minimum required in order to render the applicant *eligible* for membership, but without being exhaustive in the sense of automatically obliging or entailing admission if the conditions are deemed to be fulfilled: the applicant state cannot be admitted *unless* it is held to fulfil these conditions, but need not necessarily be admitted even if it is so held.

a. Minority view in the (First) Admissions *case: conditions of eligibility for membership are not conditions of admission to it.* In this case an important minority of the Court (consisting of Judges Basdevant, Winiarski, McNair, and Read) answered this question in the above sense. Starting (*I.C.J.*, 1948, 85) from the premise that, the United Nations being a political organ whose main function was 'to examine questions in their political aspect,

which means examining them from every point of view', they thought it followed that 'the Members of such an organ who are responsible for forming its decisions must consider questions from every aspect, and, in consequence, are legally entitled to base their arguments and their vote upon political considerations'. The four Judges went on to apply to this principle the general rule (see this *Year Book*, 27 (1950), p. 11) that no restriction on a general rule or principle of law 'can be presumed unless it has been clearly established, and that in case of doubt it is the rule or principle of law which must prevail' (*I.C.J.*, 1948, 86). Considering therefore that a general right of political appreciation existed for Members, it followed that, in deciding whether or not to vote in favour of the admission of an applicant for membership, they were entitled to exercise this right unless the terms of Article 4 of the Charter clearly established a restriction on it, and limited its exercise to the particular matters specified in paragraph 1 of the Article. This, in the opinion of the four minority Judges, it did not do: the effect of the text was that

'. . . certain qualifications therein enumerated are required for admission, and that these qualifications are essential; but there is no express and direct statement that these qualifications are sufficient and that once they are fulfilled admission must of necessity follow'.

Consequently, while this enumeration was 'exhaustive in the sense that no other condition [*sc.* of eligibility] is required by the Charter', it did not 'deprive . . . members of the legal right possessed by them of giving effect to other considerations'. In brief (on this view), the object of Article 4, paragraph 1, was, rather, to ensure the rejection of applicants who did not, in the judgment of Members, fulfil the specified conditions, than necessarily to secure and bring about the admission of those who did, merely *because* they did. As Judge Zoričić (who delivered a separate dissenting opinion, but who was in substantial agreement with the minority of four) said (loc. cit. 100), the Charter gave Members full freedom

'. . . always with the exception that they should not admit a State which, in their judgment, did not satisfy the minimum conditions of Article 4, paragraph 1.[1]

According to this view, therefore, the conditions specified in Article 4, paragraph 1, if fulfilled, confer eligibility for membership but no more.

b. The Court's view: where conditions are specified they must be presumed to be exhaustive. The minority view was expressly rejected by the Court, which said (loc. cit. 62–3):

'Nor can it be argued that the conditions enumerated represent only an indispensable minimum, in the sense that political considerations could be superimposed upon them, and prevent the admission of an applicant which fulfils them. Such an interpretation . . .

[1] The importance of this proviso has been persistently overlooked in the recent advocacy of the automatic admission of *all* fully sovereign independent states.

would lead to conferring upon Members an indefinite and practically unlimited power of discretion in the imposition of new conditions.'

Such a power, the Court considered, would be inconsistent with the character of paragraph 1 of Article 4, which, because of 'the close connexion which it establishes between membership and the observance of the principles and obligations of the Charter', must be regarded as constituting a complete 'legal regulation of the question of the admission of new States [*sic*]' in the sense of establishing not only who could, but who should, be admitted to membership (loc. cit. 63):

'. . . the spirit as well as the terms of the paragraph preclude the idea that considerations extraneous to these principles and obligations can prevent the admission of a State which complies with them'.

In reaching this conclusion the Court applied an important principle of legal interpretation, a special application of the *ut magis* rule (see second part of this study in this *Year Book*, 28 (1951), pp. 9 and 18–20), namely, that where conditions are enumerated they must be deemed to be exhaustive if the effect of not treating them as such would be to *destroy their significance*. This principle was applied by the Court in the following terms (loc. cit. 62):

'The natural meaning of the words used leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. The conditions stated in paragraph 1 of Article 4 must therefore be regarded not merely as the necessary conditions, but also as the conditions which suffice.'

(*b*) *What organ has the right of admission?* The second paragraph of Article 4 of the Charter provides that admission 'will be effected by a decision of the General Assembly upon the recommendation of the Security Council'. It had been argued that when the Security Council failed to decide in favour of a given application, it in effect recommended non-admission, and that this was therefore a 'recommendation' of the Security Council 'upon' which the General Assembly could decide to admit the applicant state, despite rejection by the Council. The Court, in the (*Second*) *Admissions* case, rejected this view *in toto*, finding that the independent and separate consent of both the Assembly and the Council was necessary before a new Member could be admitted. The actual admission was effected by the Assembly 'upon the recommendation of the Security Council'. Therefore, although the Assembly need not admit a state recommended for admission by the Council, it could not decide to admit one whose admission had *not* been recommended by the Council. The wording of the relevant clause of the Charter (Article 4, paragraph 2) made it clear that the admission must be recommended by

the Council as a pre-condition of admission by the Assembly. Therefore (*I.C.J.*, 1950, 9)

'To hold that the General Assembly has power to admit a State to membership in the absence of a recommendation of the Security Council would be to deprive the Security Council of an important power which has been entrusted to it by the Charter. It would almost nullify the role of the Security Council in the exercise of one of the essential functions of the Organisation.'

The role of the Council would in fact be reduced to one where it would merely 'study the case, present a report, give advice, and express an opinion'—an advisory instead of an executive role. The argument that when the Security Council rejected an application for admission[1] it in effect made a 'recommendation' *against* admission, 'upon' which the Assembly could act and could decide to admit the applicant despite the adverse vote of the Council, was rejected by the Court as follows (ibid.):

'. . . Article 4, paragraph 2, envisages a favourable recommendation of the Security Council and that only [*sic*]. An unfavourable recommendation would not correspond to the provisions of Article 4, paragraph 2.'

In other words, a so-called 'unfavourable recommendation' was not really a recommendation at all, but a refusal to recommend, and the Assembly could not seek to 'meet the requirement of Article 4, paragraph 2' by treating

'. . . the absence of a recommendation as equivalent to . . . an 'unfavourable recommendation', upon which the General Assembly could base a decision to admit a State to membership.'

§ 2. Obligations of Member States in Connexion with the Exercise of their Vote

(*a*) *Obligation to act in good faith.* This is one aspect of the topic of abuse of rights discussed in the first part of this study (see this *Year Book*, 27 (1950), pp. 12–14), and it will be desirable to reproduce here some of the passages there cited, on account of their relevance to the question of the exercise of voting rights. In the (*First*) *Admissions* case, the jointly dissenting Judges (Basdevant, Winiarski, McNair, and Read), without specifically endorsing the doctrine of abuse of rights, affirmed the obligation of states to act in good faith (*I.C.J.*, 1948, 91–92):

'While the Members of the United Nations have thus the right and the duty to take

[1] It will be appreciated that the underlying issue in the (*Second*) *Admissions* case was whether the formal rejection of a candidature by the Security Council must be allowed to prevail when that rejection was merely the technical outcome of the exercise of the so-called 'veto' by one of the permanent members, a numerical majority of the Council having voted in favour of admission. This is not the place to go into what is essentially a political issue, but to those interested in the question whether (short of an amendment of the Charter) there is any legal way of overcoming the apparent deadlock over admissions arising from the exercise of the veto, a study of §§ 3 and 4 below may prove of interest.

into account all the political considerations which are in their opinion relevant to a decision whether or not to admit an applicant for membership or to postpone its admission,[1] it must be remembered that there is an overriding legal obligation resting upon every Member of the United Nations to act in good faith (an obligation which moreover is enjoined by paragraph 2 of Article 2 of the Charter) and with a view to carrying out the Purposes and Principles of the United Nations. . . .

'That does not mean the freedom thus entrusted to the Members of the United Nations is unlimited or that their discretion is arbitrary.'

A little later, the jointly dissenting Judges again stated that Members were 'legally bound' to have regard to the principle of good faith, and they concluded as follows (ibid. 93):

'Nevertheless, as we have said, a Member of the United Nations does not enjoy unlimited freedom in the choice of the political consideration that may induce it to refuse or postpone its vote in favour of the admission of a State. . . . It must use this power in good faith, in accordance with the Purposes and Principles of the Organisation and in such a manner as not to involve any breach of the Charter.'

A similar view, on identical grounds, was also expressed by Judge Zoričić in the same case (ibid. 103) and, in a somewhat different form, by Judge Azevedo (ibid. 80).

(*b*) *Is there any obligation to explain or give the reasons for a particular vote?* and

(*c*) *Is a vote cast on avowedly or manifestly improper grounds invalid?* These questions may be considered together. In the (*First*) *Admissions* case, the question was discussed whether any distinction could be drawn between the reasons given for a vote, and the considerations on which it was actually based. Several of the individual Judges (Azevedo, Zoričić, and Krylov) thought that Members were under no obligation to give reasons for the way in which they voted (*I.C.J.*, 1948, 80, 97, and 111), and the two latter drew from this the inference that since, if Members did not choose to state their reasons, there was no means of knowing whether they had conformed to given criteria or not, it was useless in practice to lay down such criteria: the vote could not be controlled, and therefore no restrictions could be implied as to the grounds on which Members must exercise it.

Judge Azevedo, however, seemed to suggest that, although Members could not be compelled to give reasons for their votes, yet if they did, and it appeared that the vote had been based on improper considerations, this might enable the validity of the vote to be impugned. The Court and the four jointly dissenting Judges (Basdevant, Winiarzki, McNair, and Read), while apparently implicitly agreeing that Members were not obliged to

[1] It will be remembered that the Court itself did not agree that Members might take all relevant political considerations into account. It considered that questions of admission must be determined on the basis of the specific criteria mentioned in Article 4, paragraph 1, of the Charter, and on that basis only.

give the reasons for their votes, and while also considering that there was no way of rectifying a vote based on improper grounds, did not think that these considerations absolved Members from their legal obligation of complying with any limitations imposed by the Charter as to the way in which a vote should be exercised (*I.C.J.*, 1950, 60 and 61–66, *passim*; and 82–83 and 84–93, *passim*). The relevant passages are somewhat fragmentary and compressed, and will not therefore be textually quoted here, but a careful reading of the opinions as a whole appears to warrant the following inferences:

(i) There is no obligation on Members to state the grounds on which their vote in any given case is based.

(ii) This does not, however, relieve Members from the obligation to conform to any limitations laid down by the Charter as to the considerations on which a given vote can properly be based; to comply with any other legal rules governing the exercise of a vote; and to act in good faith.

(iii) If Members do give reasons for their vote, these must be in conformity with any rules or limitations applicable to the case, stated in or resulting from the Charter.

(iv) Members may, in the discussion preceding a vote, freely state their views, even on the basis of criteria not admitted by the Charter, but may not base their actual vote on such criteria.

(v) It would be improper for Members ostensibly to give as the ground of their vote an admitted and legitimate criterion, while in reality basing the actual vote on another and illegitimate criterion which constituted the true reason for the vote.

(vi) There is at present no means of rectifying a vote which is in fact cast contrary to these principles and, consequently, it would seem that the validity of any decision to which such a vote has contributed must nevertheless remain unaffected by it. The Member concerned acted contrary to the Charter in voting in a certain way, but the vote was in fact cast, and the decision resulted.[1]

§ 3. The Exercise of the 'Veto'

(*a*) *Are there any inherent restrictions on the use of the 'veto'?* The obligation to act in good faith considered in the immediately foregoing section would of course apply with especial force to any vote capable of operating as a veto. In the (*Second*) *Admissions* case, however, there was some discussion of the matter on a different basis, since the underlying issue in that case was whether a decision of the Security Council rejecting the

[1] It does not follow that such a decision could not be subsequently *invalidated* as the result of a reference to the Court in a specific case. The view here expressed merely means that there is no *automatic* invalidity. The implications involved are, however, beyond the scope of this article.

candidature of an applicant for admission must prevail even in those cases where it resulted solely from the single adverse vote of one of the permanent members, with all the other members of the Council (it might be) having voted in favour of admission. However, the Court took the view that, for the purposes of the question addressed to it, the propriety of the use of the veto was not in issue. It had to be assumed, therefore, that a decision of the Council not to recommend admission was a valid decision, irrespective of the fact that it had been arrived at in this way. The sole question was whether the Assembly could admit the applicant despite the absence of a recommendation by the Security Council. The two dissenting Judges, Alvarez and Azevedo, on the other hand, thought, though on slightly different grounds, that the use of the veto might have the effect of actually invalidating the Council's decision. Both Judges drew attention to the fact that the primary function of the Council was the preservation of peace and security, and suggested that the use of the veto should properly be confined to cases where the Council was exercising its functions in that field. Judge Alvarez did not exclude its use in relation to other matters also, but thought that, in such event, the use made of it must be subject to 'appraisal' by the Assembly, and if found to have been 'abused' it could be overriden by whatever means were practicable and available (e.g. in the case of the admission of new Members, by the Assembly itself deciding to admit the applicant). He said (*I.C.J.*, 1950, 20):

'Even if it is admitted that the right of veto may be exercised freely by the permanent Members of the Security Council in regard to the recommendation of new Members, the General Assembly may still determine whether or not this right has been *abused* and, if the answer is in the affirmative, it can proceed with the admission without any recommendation by the Council.'

Judge Azevedo went further, and thought that the use of the veto was, or should be, excluded entirely in relation to matters other than matters affecting peace and security. Both Judges assumed for the purposes of their argument that the question of the admission of new members was not a question affecting peace and security. Without going into the matter, it should be noted that the correctness of this assumption would not be conceded by everyone. It is not possible here to set out Judge Azevedo's argument, which was elaborate and based for the most part on his estimate of the effect of the *travaux préparatoires* of San Francisco. The chief difficulty which it must encounter is the uncompromising language of Article 27, paragraph 3, of the Charter, which provides for a qualified vote on all 'other' questions—i.e. admits the veto for all questions other than the 'procedural questions' covered by paragraph 2 of the Article. Clearly the admission of a new member could not on any view be regarded as a merely procedural matter.

(*b*) *Is a decision of the Council in regard to the admission of an applicant for membership a decision or merely a recommendation?* In the same case, Judge Azevedo drew attention (*I.C.J.*, 1950, 28) to the fact that in the *Corfu* case (Competence), the seven Judges of the Court who dealt with the point had found in effect (see § 4 below) that recommendations of the Security Council were merely recommendations in the ordinary sense of the term, and therefore not binding on Members. Judge Azevedo suggested that, this being so, the following point required investigation. Article 25 made 'decisions' of the Security Council binding on Members, but 'recommendations' were not binding; therefore they could not be 'decisions' within the meaning of Article 25. Article 27, paragraph 3, however, which laid down the voting rule embodying the veto, also referred to 'decisions', and *only* to 'decisions' ('Decisions of the Security Council on all other matters [i.e. on all non-procedural matters] shall be made by an affirmative vote of seven members, including the concurring votes of the permanent members . . .'). Unless, therefore, the term 'decisions' meant something different in Article 27 from what it meant in Article 25, and was used in different senses in the two Articles, it followed that it did not include 'recommendations' for the purposes of Article 27 either, and therefore the qualified voting rule (the 'veto') applied only to cases where the Council was taking a decision in the strict sense and not to cases where it was merely making a recommendation. Therefore it did not apply to the voting on the admission of a new Member, for the Council would not be deciding to admit, but merely be recommending (or not recommending) admission. Judge Azevedo raised the point in the following passage (loc. cit.):

> 'The really important thing is to verify whether the expression "decisions" has the same meaning in Article 25 and 27, for it could well be argued that, while denying that 'recommendations' have compulsory character, it was necessary to apply the rule of the unanimous vote [i.e. the veto] for the adoption of these "recommendations". In that case, "decisions" under . . . Article 25 would not be "decisions" under Article 27, where the same word would have a broader meaning. But to reach this conclusion it would be necessary to depart from the literal interpretation of [the] texts.'

Here Judge Azevedo himself suggested the answer to the point he raised. A recommendation, while not the same thing in its *effects* as a decision, always *involves* a decision, namely, a decision to make the recommendation. A recommendation of such an organ as the Security Council would be embodied in a resolution. The adoption of the resolution would involve a decision (to adopt it) and would be the evidence and manifestation of the Council's decision to make a certain recommendation. Similarly, if it rejected or failed to recommend an application, it would take a decision in that sense. The veto voting rule in Article 27 can therefore apply to decisions to make or not to make a recommendation, without involving any conflict

with Article 25, in which the term 'decision' relates rather to the substance and character of the decision ('Members . . . agree to accept and carry out the decisions of the Security Council . . .') rather than to the act of the Council in adopting it. It would seem that the antithesis between 'recommendation' and 'decision' is misleading. The correct antithesis of 'recommendation' is more in the nature of 'order', 'behest', 'injunction', or 'instruction'. But the processes both of enjoining and of recommending require a 'decision'. If Article 25 said that Members agreed to carry out the orders or injunctions of the Council, it would then be plain that the question whether a given 'decision' of the Council was *binding* or not depended on its content, and on whether it embodied an injunction or only a recommendation; and no difficulty would arise as to the scope of the term 'decisions' in Article 27. It would be the same if, without any alteration in Article 25, the term employed in Article 27 was 'resolutions' instead of 'decisions'.

§ 4. Character and Effect of Recommendations

(*a*) *Recommendations, even of the Security Council, are not binding.* In the *Corfu* case (Competence) it was the view of seven Judges (Basdevant, Alvarez, Winiarski, Zoričić, de Visscher, Badawi Pasha, and Krylov), who delivered a separate joint Opinion, that the term 'recommendation, according to its normal meaning, meant something not mandatory, binding, or compulsory. This resulted necessarily from their finding that, having regard, *inter alia*, to 'the normal meaning of the word recommendation, a meaning which this word has retained in diplomatic language . . .', it appeared to them impossible to accept an interpretation of paragraph 3 of Article 36 of the Charter[1] according to which this provision 'without explicitly saying so' had 'introduced more or less surreptitiously, a new case of compulsory jurisdiction' (*I.C.J.*, 1948, 31–32). In other words, the seven Judges considered that, having regard, *inter alia*, to the 'normal meaning' of the term 'recommendation', a recommendation of the Security Council under Article 36, paragraph 3, of the Charter, for the reference of a legal dispute to the Court, did not render it obligatory on the parties to make such a reference, from which it follows that the normal meaning of 'recommendation' referred to must, in their view, have been that of being non-compulsory.[2]

[1] This provision reads: 'In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.'

[2] Since the Court itself found that both the parties had in fact *consented ad hoc* to a reference of the dispute to the Court, it did not consider it necessary to deal with the question whether such a reference would otherwise have been obligatory on them.

It is worth noticing the nature of the contrary argument put to the Court in the *Corfu* case on this point. It was that since a *decision* of the Council was required in order to arrive at a recommendation, any recommendation was in that sense a decision, and therefore constituted something which Members had agreed under Article 25 to carry out. It is, however, necessary to distinguish between the fact that a recommendation requires or *involves* a decision, and the binding character of that decision. The seven Judges who dealt with the point in effect rejected the view implicit in this argument that a decision to recommend was of the same order of decision as those referred to in Article 25, by which Members of the United Nations undertake to accept and carry out the 'decisions' of the Council. The seven Judges in effect took the view that Article 25 applied only where the 'decision' took a mandatory form, and not to cases where the Council merely decided to recommend something and therefore put its decision in the form of a recommendation. In brief, as already indicated in § 3 (*b*) above, the real distinction is not between 'decisions' and 'recommendations', but between decisions involving an order, instruction, or injunction, and decisions merely involving a recommendation. It is for this reason that the qualified voting rule (or 'veto') embodied in Article 27, paragraph 3, of the Charter applies to all 'decisions' of the Council, even those which are only decisions to 'recommend' or 'invite' a certain course.

(*b*) *Two broad types of recommendation. Distinction between recommending 'what' and recommending 'that'.* The Court's finding in the (*Second*) *Admissions* case enables it to be said that there are two broad senses in which the notion of 'recommendation' may be employed in relation to the power of an international entity or organism to make recommendations. The first is a quite general power to make recommendations at large in certain events, as, for instance, in the type of case where it is said that a given entity 'may recommend the measures to be taken' (or *what* measures shall be taken) to deal with some situation. In such a case the entity may recommend one set of measures, or it may recommend another, or yet a third, and so on, but there is no specific or pre-envisaged recommendation which it either makes or fails to make, and consequently no question of 'favourable' or 'unfavourable' or of 'positive' or 'negative' recommendations. But there is another sense in which the power to make a recommendation may exist, i.e. a power may be given to make a specific, indicated recommendation —or not to make it (to 'recommend *that*' such and such be done.) Here, it is not a case of making one of a number of alternative—or of a series of different possible—recommendations, but of either making or not making the one specified recommendation. An example of this would be the sort of case where an entity is empowered, for instance, 'to recommend the suspension of any Member whose contributions are more than two years

in arrear'. Here there is either a decision to recommend suspension or there is not. There is no alternative. In this type of case failure to make the specified recommendation does not amount to a positive recommendation in the opposite sense. Thus, to revert to the example given, failure to recommend suspension is simply failure to recommend suspension; it is not the equivalent of a positive recommendation that the Member concerned ought not to be suspended, though it may have that result for the time being. It simply means that there is no recommendation at all; the matter is left quite open or in abeyance.

Consequently, in the (*Second*) *Admissions* case, it was the failure to distinguish between these two senses of the power to recommend, i.e. between the category of 'may recommend *what* [measures]' and the category 'may recommend *that* [such and such be done]' which led to the argument (rejected by the Court) that a non-recommendation by the Security Council constituted a (negative) recommendation. Had Article 4, paragraph 2, of the Charter been framed in more general terms, for instance, had it said that the Security Council was to make recommendations 'concerning' or 'as to' the admission of an applicant for membership, or 'whether' an applicant should be admitted or not, it might have been possible to argue that a vote of the Security Council rejecting an application should be regarded as a positive recommendation not to admit. If so, there would have been a 'recommendation' of the Security Council affording the requisite basis for a decision of the Assembly to admit or not to admit—i.e. the Assembly could perhaps have decided to admit, though the Council had decided against. But on the actual language of paragraph 2 of Article 4 as interpreted by the Court, the position is that the Security Council either recommends admission or it fails to recommend admission. In the latter event it is not the case that there is *a recommendation not to admit*. There is simply no recommendation at all. Since the Assembly can only admit an applicant for membership 'upon the recommendation of the Security Council', it follows that it cannot admit in such a case; it can discuss or disapprove, but it has no power to admit, because the essential basis is lacking. This was the real essence of the Court's finding.[1]

§ 5. Respective Status of the Security Council and of the Assembly

Equal general pre-eminence of both bodies in the structure of the United Nations. In the (*Second*) *Admissions* case the Court affirmed this principle as follows (*I.C.J.*, 1950, 8):

'The General Assembly and the Security Council are both principal organs of the

[1] By parity of reasoning, exactly the same principle applies to the appointment of a new Secretary-General of the United Nations. Article 97 equally provides that this shall be effected 'by the General Assembly upon the recommendation of the Security Council'.

United Nations. The Charter does not place the Security Council in a subordinate position.'

The point at issue being whether the Assembly could override the Council in the matter of the admission of new members, it was only necessary to make specific mention of the independence of the *Council*; but the independence of the Assembly follows generally from its position as a 'principal organ' of the United Nations (see Article 7 of the Charter).[1] Independence means independence within the sphere assigned in the Charter to the organ concerned. Each has its role and, in fulfilling that role, and in its own sphere, is independent of the other, in the sense that neither can give, nor need take, instructions from the other. For this reason the Court was unable, in the (*Second*) *Admissions* case, to subscribe to the doctrine put forward by the dissenting Judges that the Assembly had a power to 'appraise' decisions of the Security Council, and in effect to reverse or override them where it appeared that they had been arrived at by an abuse of the veto. In fact the Court said (ibid. 10):

'. . . nowhere has the General Assembly received the power to change, to the point of reversing, the meaning of a vote of the Security Council'.

§ 6. Domestic Jurisdiction

What is a matter of domestic jurisdiction within the meaning of Article 2, paragraph 7, of the Charter?

In the *Peace Treaties* case (First Phase) it was argued that the General Assembly had acted *ultra vires* and contrary to the Charter in asking the Court to give an Advisory Opinion, since the whole matter had arisen out of complaints as to the actions of certain governments in their own territories and with reference to their own nationals. It was therefore said to be essentially a matter of domestic jurisdiction within the meaning of Article 2, paragraph 7, of the Charter,[2] in which the Assembly was accordingly precluded from intervening, and its action therefore constituted an illegal interference in the internal affairs of the states concerned. The Court stated this objection as follows (*I.C.J.*, 1950, 70):

'It is contended that the Request for an Opinion was an action *ultra vires* on the part of the General Assembly because, in dealing with the question of the observance of human rights and fundamental freedoms in the three States mentioned above, it was "interfer-

[1] A similar independence exists for the Court (see below, Chapter II) and, strictly, for the Secretariat (see Chapter XV of the Charter), both of which are also constituted principal organs under Article 7. On the other hand, the Economic and Social Council and the Trusteeship Council (equally principal organs under Article 7) are to a certain degree and in certain respects subordinated to the Assembly by express provisions of the Charter setting out their functions and powers.

[2] This provides that 'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . .'

ing" or "intervening" in matters essentially within the domestic jurisdiction of States. This contention against the exercise by the Court of its advisory function seems thus to be based on the alleged incompetence of the General Assembly itself, an incompetence deduced from Article 2, paragraph 7, of the Charter.'

(*a*) *Matters which are the subject of international obligations are not matters of domestic jurisdiction.* In rejecting the contention formulated in the foregoing quotation, the Court pointed out that it was not called upon to deal with the charges of violations of human rights brought before the Assembly since the questions put to it related neither to these charges nor to the interpretation of the treaty articles dealing with human rights and fundamental freedoms. The object of the questions was much more limited, and they were

'. . . directed solely to obtaining from the Court certain clarifications of a legal nature regarding the applicability of the procedure for the settlement of disputes . . . provided for in . . . [the relevant Articles of the Treaties].'

The Court continued:

'The interpretation of the terms of a treaty for this purpose could not be considered as a question essentially within the domestic jurisdiction of a State. It is a question of international law which, by its very nature lies within the competence of the Court.'

The feature of interest in this pronouncement lies in the statement that the interpretation of a treaty is a question of international law and therefore, by implication, that a question of international law is *ipso facto* removed from the category of questions of domestic jurisdiction.[1] This in turn implies

[1] Thus reaffirming in effect the classic dictum of the former Permanent Court of International Justice in the case of the *Tunis and Morocco Nationality Decrees* (Series B, No. 4, p. 24):

'. . . it is enough to observe that in a matter which . . . is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law . . . and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the [domestic jurisdiction] exception. . . .'

And again (ibid. 25):

'This consideration assumes especial importance in the case of a matter which, by international law, is, in principle, solely within the domestic jurisdiction of one Party, but in regard to which the other Party invokes international engagements which, in the opinion of that Party, are of a nature to preclude in the particular case such exclusive jurisdiction.'

It is worth noting, in this connexion, that in the *Peace Treaties* case Judge Krylov, in his dissenting Opinion (*I.C.J.*, 1950, 112) cited an article in the *American Journal of International Law* (43 (1949), p. 776) by the Belgian jurist, M. Joseph Nisot, in which he drew attention to the fact that Article 2, para. 7, of the Charter uses the word 'essentially' [within the . . . jurisdiction, &c.], whereas the corresponding provision of the former Covenant of the League of Nations had used 'wholly'. M. Nisot suggested that in consequence of this change, matters dealt with in a treaty could no longer be regarded as being thereby automatically removed from the category of domestic jurisdiction, since even if not 'wholly', they might well remain 'essentially', matters of domestic jurisdiction, despite their inclusion in the treaty. There is here an ambiguity as to what the 'matter' or 'matters' under discussion consist of. Whatever the underlying questions to which it may relate, the actual and formal issue before a court in such a case is an allegation of breach of

that the concept of domestic jurisdiction is a relative one, depending on the state and content of international law at any given time, and that there is no inherently necessary or fixed category of matters which always are and must be matters of domestic jurisdiction.[1] The gradual enlargement of the scope and content of general international law and the process of treaty making, is indeed constantly removing matters from the field of domestic jurisdiction and causing them to enter that of international obligation—with, however, this important difference between the two cases, that what becomes a matter of international obligation by reason of being, or coming to be, the subject of a general rule of international law, ceases universally to be a matter of domestic jurisdiction; whereas what becomes a matter of international obligation by virtue of a treaty, ceases to be within domestic jurisdiction only for the actual parties to the treaty, in a case arising between them, and to the extent that it is dealt with in the treaty.[2]

(*b*) *Matters which are not the subject of international obligations remain matters of domestic jurisdiction.* This is the converse and complement of the previous proposition and, it is submitted, equally a fair inference from the finding of the Court in the *Peace Treaties* case, for even if this converse proposition does not follow as a matter of pure logic, it must follow as a matter of practical necessity, since there exists no other reasonably certain test of what is a matter of domestic jurisdiction, and the point would be open to endless argument. The criterion of being of 'international concern' is not adequate, because of its vagueness. Under present-day conditions very little that a country does fails to have some repercussion outside its borders, while it is precisely those matters which are most obviously within the field in which the liberty of action of governments is not legally circumscribed as a matter of general international law, e.g. a country's tariff or immigration policies,

the treaty, or the question of the interpretation of a phrase in it, or of the correct application of certain of its provisions. These issues are, *as such*, distinct from, though of course based on, the substantive content of the articles they relate to. As issues, they clearly lie essentially or even wholly on the international plane, and it is these issues that constitute the 'matter' or 'matters' in question for purposes of determining the applicability of the exception of domestic jurisdiction. If the view suggested by M. Nisot prevailed, the effect would be that everything would be domestic jurisdiction that was not *in principle* governed by *general* rules of international law. But this would be directly contrary to the above-quoted findings of the Court and the Permanent Court, that matters of *treaty* obligation cease, so far as that obligation is concerned, to be matters of domestic jurisdiction.

[1] *Vide* the dictum of the Permanent Court in the same case (ibid.):

'The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, *in the present state of international law*, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.' (Italics added.)

[2] See again the same case (ibid.):

'Article 15, paragraph 8 [the domestic jurisdiction clause of the League Covenant], then ceases to apply as regards those States which are entitled to invoke such rules [i.e., in the contract, the rules of international law governing treaty obligations].'

which are also most liable to be of 'concern' to other countries.[1] The criterion of international concern would therefore unduly restrict the field, if it would not virtually destroy the whole concept, of domestic jurisdiction, while at the same time failing to afford any reasonably objective test, since the question of what is of international concern is itself a matter of opinion. To hold, therefore, not only that matters of international obligation are not matters of domestic jurisdiction, but equally that matters *not* of international obligation *remain* matters of domestic jurisdiction, is to effect a great simplification of an intricate problem, and also to reduce it to proportions which are manageable—for even if there may sometimes be difficulty in deciding whether a given matter is one of international obligation or not, at least the issue is capable of settlement by reference to known or ascertainable criteria, and is above all an issue which is itself capable of legal determination.[2]

§ 7. Trusteeship

(*a*) *General.* In the *South-West Africa* case, the Court, and some of the individual Judges, said much about the *general* character of the former League of Nations' institution of Mandates which would apply equally, *mutatis mutandis*, to the United Nations' institution of Trusteeship, which serves the same basic purpose. Thus the views expressed as to the status of mandated territories, the objective character of the Mandate, its independence of the instrument under which it was originally created, the general nature of the mandatory Power's obligations, and the consequences that flow from these factors, would all apply, or so it would seem, in similar circumstances to Trusteeships and Trust Territories, and to the position of the Administering Power. These matters were considered in the first part of this study in this *Year Book*, 27 (1950), pp. 8–11 and 14–15.

(*b*) *No obligation to place territories under Trusteeship.* In the *South-West Africa* case the Court was asked to say whether the Union of South Africa

[1] Cf. again the Permanent Court (loc. cit., p. 23):

'The words "solely within the domestic jurisdiction" seem rather to contemplate certain matters which though they may very closely concern the interests of more than one State, are not in principle regulated by international law. *As regards such matters, each State is sole judge.*' (Italics added.)

It is perhaps worth noting that a threat to peace and security is in principle a matter which is now governed by international law, or by treaty obligations to which the great majority of states are parties. Aggression is an international crime, while the Pact of Paris (Kellogg Pact) and Article 2, paragraphs 3 and 4, and other provisions of the United Nations Charter regulate the use of force in the international sphere. Nevertheless, the fact that a matter which is *itself* one of domestic jurisdiction, *gives rise to* a threat to peace and security, does not change the character of the original matter, or warrant intervention in it *as such*. It merely superimposes on the original matter a *second* matter (the threat to peace and security), in which international intervention may be justified for the purpose of countering the threat, but not (except incidentally and indirectly) for the specific purpose of dealing with the original matter.

[2] The almost more important question of what constitutes *intervention*, assuming the matter involved to be one of domestic jurisdiction, has not yet been considered by the Court.

was under any legal obligation, by virtue of Chapter XII of the Charter, to place the territory of South-West Africa under Trusteeship, and answered this question in the negative. An important minority of the Court (consisting of Judges Guerrero, Alvarez, Zoričić, de Visscher, Badawi Pasha, and Krylov) disagreed with this view; but, as the arguments and counter arguments relate mainly to the meaning and effect of particular words and phrases in Chapter XII, and have no application outside it, they are not material for the purposes of this study.[1] There were, however, certain other matters which are of general interest. The views of the minority were for the most part expressed in the opinion given by Judge de Visscher, and it is from this opinion that the following points are taken.

(i) *Difference between territories in categories* (*a*) *and* (*b*) *of Article* 77 *of the Charter, and those in category* (*c*). Judge de Visscher drew attention to a certain difference in the character of the territories coming in categories (*a*) and (*b*) of Article 77,[2] namely, mandated territories and territories detached from enemy Powers in consequence of the war; and those in category (*c*), namely, ordinary colonial and overseas territories of Members of the United Nations, 'voluntarily placed under the [Trusteeship] system'. In determining the intentions of the framers of the Charter as to what territories should be placed under Trusteeship, Judge de Visscher thought it necessary (*I.C.J.*, 1950, 189) to take into consideration

'. . . the differences between the territories enumerated in Article 77 from the point of view of the international interest which they respectively presented at the time of the drafting of the Charter: those in category (*a*) were already subject to an international régime, and moreover, were clearly known and defined; those in category (*b*) were detached from enemy States by the common victory of the Allied Powers. For various reasons they both possessed an international element, which marked them out as being *prima facie* the necessary objects of regulation by international agreement. The position of territories in category (*c*) was quite different in this respect. Complete freedom of decision was left to the States responsible for their administration to place them "voluntarily" under the system and consequently to consent to negotiations to that effect, or to refuse to take part in such negotiations.'

From the exclusive use of the term 'voluntarily' in connexion with category (*c*), coupled with the difference in the character of the territories concerned, Judge de Visscher deduced that there was an obligation in the case of mandated territories at least to enter into negotiations for transferring them to the trusteeship system. The Court was unable to agree with this view, because it considered that Article 77 taken as a whole was only

[1] See above, p. 1, n. 2.

[2] By Article 77, the trusteeship system was to apply 'to such territories in the following categories [i.e. in categories (*a*), (*b*), and (*c*) described above] as may be placed thereunder by means of trusteeship agreements', and it was further to be 'a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms'.

permissive in character (and that this was borne out by Articles 75 and 79) in relation to all the categories of territories mentioned, and that the special use of the word 'voluntarily' in connexion with category (*c*) could be explained (loc. cit. 139) 'as having been used out of an abundance of caution and as an added assurance of freedom of initiative to States having territories falling within that category'.

(ii) *Value of the process of entering into negotiations.* In developing his view that Members of the United Nations administering former League of Nations' mandates were at least under an obligation to embark on negotiations for placing the territories concerned under the trusteeship system, and 'to pursue them as far as possible with a view to concluding agreements', Judge de Visscher sought to meet in the following way the objection that, since there could in the nature of things never be an obligation to agree, there would be little point in postulating an obligation to negotiate (loc. cit. 188):

'Nor should we overlook the psychological value of the opening of negotiations, particularly when the object of the negotiations, as is the case here, is only to apply in practice principles forming part of a pre-established international régime. The opening of such negotiations is often a decisive step toward the conclusion of an agreement.'

This matter has been more fully considered in the second part of this study in this *Year Book*, 28 (1951), at pp. 25–26.

(iii) *Possible frustration of the Trusteeship system in the absence of any obligation to place mandated territories under Trusteeship.* Judge de Visscher suggested (loc. cit. 189) that the United Nations' trusteeship system 'would never have had more than theoretical existence' if the Members administering mandated territories had considered themselves under no obligation to negotiate agreements for converting the mandates into trusteeships, and he pointed out that in fact practically all the mandatory Powers had done so. From this he concluded (ibid.) that

'The obligation to be ready to negotiate with a view to concluding an agreement represented the minimum of international co-operation without which the entire régime contemplated and regulated by the Charter would have been frustrated.'

Taking his remarks as a whole, it is clear that Judge de Visscher regarded mandated territories as constituting the, so to speak, natural field of recruitment for the trusteeship system. These territories were already impressed with a character closely similar to that contemplated for trust territories; indeed it would not be too much to say that the whole conception of trust territories derived from the mandate system. Members of the United Nations when subscribing to the Charter must have been aware of this, and since, as the Court had found, they continued in any case to be bound by mandate obligations where existing, the natural development would be the conversion of these mandates into trusteeships. Judge de Visscher's

remarks also implied that in view of the evident uncertainty as to whether territories falling into categories (*b*) and (*c*) of Article 77 would be placed under trusteeship, the only field to which the United Nations could look with any confidence in order to furnish its trusteeship system with substance and content, was the mandates field; and Members administering mandated territories were therefore under a certain responsibility.

The Court, on the other hand, while clearly in sympathy with the feeling underlying these arguments, evidently considered them to be of an extra-legal character and not sufficient to override the fundamentally permissive wording of the Articles (75, 77, and 79) relevant to the placing of territories under trusteeship. After drawing attention to the similarity of object of the two systems, the Court pointed out that the Charter in fact only established the one system and did not 'contemplate or regulate a co-existing Mandates System'. The Court therefore thought (loc. cit. 140) that while

'... it was expected that the mandatory States would follow the normal course indicated by the Charter, namely, conclude Trusteeship Agreements',

expectation was not the same thing as legal obligation, and (ibid.) that

'The Court is however unable to deduce from these general considerations any legal obligation for mandatory States to conclude or to negotiate such agreements. It is not for the Court to pronounce on the political or moral duties which these considerations may involve.'

CHAPTER II

QUESTIONS OF COMPETENCE AND PROCEDURE

Division A: Competence

§ 1. Jurisdiction and Competence not Identical Concepts

(*a*) *Distinction between jurisdiction or competence in a class of case, and with reference to a particular case.* In the *Corfu* case (Competence), Dr. Daxner, the Albanian Judge *ad hoc*, drew attention to the frequently neglected distinction between two aspects of any tribunal's jurisdiction or competence. These terms represent concepts which theoretically are quite distinct, even if in practice it is sometimes difficult to tell which term is the appropriate one. Alternatively, one of these terms may be held to be a special case of the other; but whichever view be taken there are two aspects of jurisdiction or competence. There is first the general *field* in which a court exercises and is entitled to exercise its functions, as for instance when it is said that courts are competent (or have jurisdiction) to hear and determine legal questions, but not political questions; or if it is said that a tribunal set up under a treaty to decide disputes regarding its interpretation and application has competence (or jurisdiction) to hear cases arising on

that treaty, but not cases arising on some other treaty. Next there is the question of the competence of a court to hear and determine a particular case belonging to the category to which its general jurisdiction relates. Thus a court may be competent to deal with a certain class of case, but only if certain conditions are fulfilled in the individual case, e.g. the parties must consent, or some preliminary procedure such as an attempt to settle the dispute by recourse to diplomatic methods must have been gone through.

(*b*) *Limitations in respect of the class of parties or particular parties bound by the tribunal's jurisdiction.* Another element of duality is introduced into the matter (as Dr. Daxner also pointed out) by the fact that the general field of operation of a tribunal may be limited not only to a certain class of case, but also to a certain class of parties, e.g. states (see Article 34 (1) of the Statute of the International Court),[1] or states which are parties to the Statute of the Court (i.e. have accepted its jurisdiction in the general sense —but not necessarily in any particular case, which may depend on other considerations, e.g. *ad hoc* consent). In cases where a tribunal is only 'open' to a certain class of states, it will only have jurisdiction (or be competent) in a case arising between states belonging to that class, but will not necessarily have jurisdiction (or be competent) in any particular instance of such a case. Dr. Daxner drew attention to this last point (*I.C.J.*, 1948, 38) when he said:

'First, I must point out that it is necessary to make a clear difference [*sc.* distinction] between two notions:

1. Ability to appear before the Court;
2. Competence of the Court.

'Ability to appear before the Court depends on the fulfilment of two conditions: (*a*) only States . . . and not other juridical nor physical persons may appear before the Court, (*b*) such States must be parties to the Statute, i.e. must accept the jurisdiction of the Court.'

Dr. Daxner then reviewed the conditions under which, according to the relevant instruments, states not parties to the Statute could appear before the Court,[2] and continued (loc. cit. 39):

[1] Thus, although in the *Injuries* case the Court found that the United Nations, *qua* international organization, has international personality and can prefer claims against states, nevertheless it could not (according to the present text of the Statute) appear as a party before the Court, this being reserved to states; and the Court confirmed that the international personality of an organization did not make it a state.

[2] Dr. Daxner's remarks are quoted here as illustrative of the distinction between jurisdiction or competence in the general sense, and as existing or not existing in a particular case. The Court did not agree with the way in which Dr. Daxner applied this distinction (in itself perfectly valid) to the facts of the *Corfu* case. The Court considered that Albania had accepted the jurisdiction of the Court in relation to the specific case, whereas Dr. Daxner's view was that this acceptance only constituted an acceptance of the Court's jurisdiction in the general or preliminary sense, but not in relation to the particular case.

'In my opinion, the word "jurisdiction"[1] has two fundamental meanings in international law. This word is used:

(1) to recognise the Court as an organ instituted for the purpose *jus dicere* and in order to acquire the ability to appear before it;

(2) to determine the competence of the Court, i.e., to invest the Court with the right to solve concrete cases.

'In the first meaning, the word jurisdiction has been used in the Protocol of Signature [of the Statute of the Permanent Court] of December 16th, 1920. By this Protocol, the States accepted "the jurisdiction of the Court", but nobody has ever been of the opinion that this should be construed as acceptance of the compulsory jurisdiction of the Court for a concrete case . . . the acceptance of the jurisdiction of the Court is a *preliminary* condition to be able to appear before the Court. By this act . . . the competence of the Court is not of course yet established . . . recognition of the jurisdiction, in order to acquire ability to appear before the Court, does not involve *ipso facto* recognition of the Court's competence [i.e. in a particular case].'

§ 2. Competence of the Court in Contentious Proceedings (Litigation between States)

(*a*) *Necessity for the consent of the parties.* In the *Corfu* case (Competence) and again in the *Peace Treaties* case (First Phase), the Court reaffirmed what has always been fundamental to the competence of international tribunals in particular cases, that the consent of the parties is the basis of jurisdiction. In the *Corfu* case, the clearest statement of the matter was given by the seven Judges (Basdevant, Alvarez, Winiarski, Zoričić, de Visscher, Badawi Pasha, and Krylov) who delivered a joint separate opinion. They said (*I.C.J.*, 1948, 31):

'Under the régime of the Charter, the rule holds good that the jurisdiction of the International Court of Justice, as of the Permanent Court of International Justice before it, depends on the consent of the States parties to a dispute.'

In the *Peace Treaties* case (First Phase) the Court, distinguishing between contentious and advisory cases, said (*I.C.J.*, 1950, 71):

'The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases.'

Two points may be noticed with reference to the character of this consent: (i) it need not, of course, be given *ad hoc* in each individual case and may have been given generally beforehand, as when a state becomes a party to a treaty providing for the reference to a tribunal of all disputes that may arise concerning its interpretation and application, or makes the Declara-

[1] It is desirable that some agreed terminology should be found for this matter. The relevant Chapter of the Court's Statute is headed in both the French and English texts 'Competence of the Court'. But in Article 36, which is part of that Chapter and which relates to jurisdiction or competence with regard to particular cases, the English text uses the term 'jurisdiction', while the French uses 'compétence' in one place and 'juridiction' in another. Dr. Daxner employed the term 'competence' as a particular case of jurisdiction, whereas the Statute of the Court appears (on the whole) to regard jurisdiction as a particular case of the general term 'competence'.

tion provided for in Article 36 of the Court's Statute, accepting the Court's jurisdiction as compulsory; (ii) this consent, whether given *ad hoc* in the particular case, or generally and beforehand, is (as Dr. Daxner pointed out—see previous section) quite distinct from the consent to the general functioning and operation of the Court as an institution which is involved by being a party to the Statute of the Court—and which also involves the result that if consent is thereafter given in relation to a particular case, this is necessarily done on the basis of the Statute, the provisions of which then automatically apply to the proceedings and govern the position of the parties.

(*b*) *Consent given* ad hoc *in an individual case need not be given in any special form.* In particular, it need not take the form of a joint special agreement or '*compromis*' concluded by the parties before going to the Court. This was affirmed by the Court in the *Corfu* case (Competence) in the following terms (*I.C.J.*, 1948, 27–28):

'While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form. . . .

'Furthermore, there is nothing to prevent the acceptance of jurisdiction, as in the present case, from being effected by two separate and successive acts, instead of jointly and beforehand by a special agreement. As the Permanent Court of International Justice has said in its Judgment No. 12, of April 26th, 1928, page 23: "The acceptance by a State of the Court's jurisdiction in a particular case is not, under the Statute, subordinated to the observance of certain forms, such as, for instance, the previous conclusion of a special agreement".'

This means (and such was the point at issue in the preliminary stages of the *Corfu* case) that consent may be given—on the part of the plaintiff state—by a unilateral application to the Court under Article 40 of the Statute and Rule 32 of the Rules of Court, followed—on the part of the defendant state—by acceptance of the jurisdiction, which might be evidenced by the appointment of an agent under Rule 35, or in some other way. In the *Corfu* case, the Albanian contention was that since neither party was compelled to agree to recourse to the Court, the proceedings could only be commenced by a special agreement or *compromis*, and that the United Kingdom action in filing a unilateral application was incorrect. The Court not only declined to accept this view, but held the procedure followed by the United Kingdom to be the more appropriate in the circumstances (ibid.):

'In submitting the case by means of an Application, the Government of the United Kingdom gave the Albanian Government the opportunity of accepting the jurisdiction of the Court. This acceptance was given in the Albanian Government's letter of July 2nd, 1947.

'Besides, separate action of this kind was in keeping with the respective positions of

the parties in proceedings where there is in fact a claimant, the United Kingdom, and a defendant, Albania.'

This last point is of considerable practical importance, for the very fact that the parties are in the position of plaintiff and defendant may make it difficult or even impossible for them to agree on the exact terms of a *compromis* or special agreement, and, if this were the only means of starting proceedings in cases requiring the *ad hoc* consent of the parties, it might often be very difficult to get the matter before the Court at all. In particular, a defendant state, while nominally agreeing to recourse to the Court as a means of settlement, could in practice interpose serious delays in the course of negotiating the terms of the *compromis*.

(*c*) *The institution of proceedings by unilateral application is not confined to cases of compulsory jurisdiction.* This is really only another way of stating the previous proposition, but the point was specifically made by the Court in the *Corfu* case (*I.C.J.*, 1948, 27–28) as follows:

'The Albanian contention . . . is essentially founded on the assumption that the institution of proceedings by application is only possible where compulsory jurisdiction exists and that, where it does not, proceedings can only be instituted by special agreement.

'This is a mere assertion . . . Article 32, paragraph 2, of the Rules does not require the Applicant, as an absolute necessity, but only "as far as possible", to specify in the application the provision on which he founds the jurisdiction of the Court. It clearly implies, both by its actual terms and by the reasons underlying it, that the institution of proceedings by application is not exclusively reserved for the domain of compulsory jurisdiction.'

(*d*) *Article 36, paragraphs 1 and 3, of the Charter, do not create a fresh case of the compulsory jurisdiction of the Court.* A recommendation by the Security Council under this provision of the Charter, that the parties to a dispute should refer it to the Court, does not oblige them, or either of them, to do so. This was the view expressed by seven Judges of the Court in the *Corfu* case, and it has already been discussed (see above, Chapter I, Division C, § 4). The Court itself did not deal with the point, as it found that Albania had in fact consented to the jurisdiction.

(*e*) *The Court's jurisdiction is confined not only to cases which the parties have consented to submit to it, but also to pronouncing on the actual submissions made by the parties.* In the *Asylum* case (Interpretation), the Court was asked under Article 60 of the Statute[1] to interpret the judgment which it had previously given on the substantive merits of the case. The Court declined to do this on two grounds: first, that the real object of the request was not to obtain an interpretation of the actual judgment, but to obtain

[1] Article 60 reads as follows: 'The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.'

a decision on other questions not covered by the judgment precisely because they had never been submitted to the Court by the parties; and, secondly, that the dispute between the parties on this particular matter was not a 'dispute as to the meaning or scope of the judgment within the meaning of Article 60', but was about other matters. On these points the Court said (*I.C.J.*, 1950, 403):

> 'The "gaps" which the Colombian Government claims to have discovered in the Court's Judgment in reality are new questions, which cannot be decided by means of interpretation. Interpretation can in no way go beyond the limits of the Judgment, fixed in advance by the Parties themselves in their submissions.
>
> 'In reality, the object of the questions submitted by the Colombian Government is to obtain, by the indirect means of interpretation, a decision on questions which the Court was not called upon by the Parties to answer.'

The general principle applied by the Court in reaching these conclusions was stated by it as follows (ibid. 402):

> '. . . it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions.'

Although these findings of the Court related to the submissions made to the Court by the parties in the course of their written and oral arguments, it would seem that the principle involved is of wider application, and would apply equally to the question of determining into what matters a tribunal can properly go when deciding a case referred to it by means of a special agreement or *compromis*. In the application of the same principle it would follow that the Court could only hear and determine the matters actually submitted to it under the instrument concerned, and would have no jurisdiction to go into any other points.

§ 3. Advisory Opinions

(*a*) *Competence of the Court to give advisory opinions. Their nature and character*

(i) *Place of the Court within the framework of the United Nations.* The place of the Court within the framework of the United Nations has a considerable bearing on its position in giving organs of the United Nations advisory opinions, and on the position of these organs in requesting such opinions. In the *Peace Treaties* case (First Phase), the Court in effect endorsed the view suggested to it in the course of the argument in that case, that it had a special position in relationship to the United Nations, different from that of the former Permanent Court of International Justice regarding the League of Nations. The latter, though closely related to the League, was not created by the Covenant but by a separate self-contained

instrument. It was not an actual organ of the League, and Members of the League were not *ipso facto* parties to the Statute of the Court by virtue of their membership. The International Court of Justice, on the other hand, was set up by Article 92 of the Charter as 'the principal judicial organ of the United Nations'; its Statute is annexed to the Charter and is stated to form 'an integral part' of it. Under Article 93 of the Charter 'all Members of the United Nations are *ipso facto* parties to the Statute [of the Court]'. Non-members can only become parties on conditions to be determined in each case by the United Nations itself, whereas non-members of the League could become parties to the Statute of the Permanent Court at will. The significance of these factors will emerge later.

(ii) *General character of the advisory jurisdiction.* Under the relevant provisions, namely, Article 96 of the Charter and Article 65 of the Court's Statute, advisory opinions cannot be requested by or given to states or groups of states, but only by and to the General Assembly of the United Nations, the Security Council, and such other organs of the United Nations and of the Specialized Agencies as may be authorized thereto by the General Assembly. In one sense, this completely regulates the jurisdiction of the Court to give advisory opinions. It has jurisdiction to give them to the entities in question, but no jurisdiction to give them to other entities or to states. Furthermore, it follows from the character both of the advisory jurisdiction and of the entities to which the opinions are rendered that, in theory at any rate, and in form, advisory proceedings are not contentious: in any case states are not parties to them as they are to a dispute in the nature of a litigation.

(iii) *Contentious aspects of the advisory jurisdiction.* Nevertheless, states may in practice be very much affected by the outcome of advisory proceedings, which may indeed have had their origin in a difference of opinion between two or more states, and recognition of this fact is given by the Statute and the Rules of the Court in various ways. Thus, where the Court has been asked to furnish an advisory opinion on any matter, Article 66 of the Statute enables states to furnish their views to the Court about it, in the form of both written and oral statements; Article 68 provides that in the exercise of its advisory functions the Court shall be guided by the provisions dealing with contentious cases 'to the extent to which it recognizes them to be applicable'; this is repeated by Rule 82 of the Rules of the Court, where it is added that 'for this purpose [the Court] shall above all consider whether the request for the advisory opinion relates to a legal question actually pending between two or more States'; and finally, the effect of Rule 83 and Article 31 of the Statute is that if the question is of that character, any state concerned not having a judge of its own nationality on the Court, may appoint one to sit *ad hoc*, as in contentious cases. In con-

sequence, there has tended to be an element of doubt as to the exact scope of the jurisdiction to give advisory opinions, and as to the cases in which it was proper for the Court to exercise it. The questions involved might be formulated as follows:

a. What in general is the type of question in relation to which the Court can give an advisory opinion, and is it precluded from doing so where the request is allegedly of a 'political' character?

b. Where individual states are affected or envisaged by the request, or the matter is connected with a dispute between states, is the consent of the states concerned necessary before the Court can give an opinion? Can any state prevent the Court from giving an advisory opinion?

c. Is the Court bound to give an advisory opinion when requested to do so by an entity entitled to make the request?

d. If the Court has a discretion in the matter, how in general, and on what grounds, should it exercise this discretion?

In the (*First*) *Admissions* and (*Second*) *Admissions* cases and in the *Peace Treaties* case, the Court either answered or gave guidance on all these questions and on a number of related points. The results are set out below.

(iv) *The Court is entitled to give an advisory opinion 'on any legal question' (cf. Article 96, paragraph 1, of the Charter, and Article 65 of the Statute). The motive of the request is irrelevant. The Court may advise on abstract questions.* In confirming its competence to advise on any legal question, the Court made the following points: *first*, if the question put to it is in itself a legal question (and, *inter alia*, all questions relating to the interpretation of international instruments—with which requests for advisory opinions are usually concerned—are *ipso facto* legal questions), the fact that it has a political element is irrelevant; *second*, the Court is not concerned with the motives or considerations which have inspired the request; *third*, the Court is entitled to give advisory opinions on abstract questions, and, if the question is a legal one, it is immaterial whether it is abstract in character or relates to a specific case; *fourth*, the Court is entitled to interpret the Charter of the United Nations.[1] The Court made these points in the (*First*) *Admissions* case in the following passage (*I.C.J.*, 1948, 61):

'To determine the measure of a treaty provision . . . is a problem of interpretation and consequently a legal question.

'It has nevertheless been contended that the question put must be regarded as a political one[2] and that, for this reason, it falls outside the jurisdiction of the Court. The

[1] It had been suggested that the interpretation of such an instrument as the Charter was a political matter and therefore solely for the member states of the United Nations or its political organs, and that the Court would be assuming a political function if it did so.

[2] The question concerned the exhaustive or non-exhaustive character of the conditions of admission of new Members set out in Article 4 of the Charter, and it was strenuously contended

Court cannot attribute a political character to a request which, framed in abstract terms, invites it to undertake an essentially judicial task, the interpretation of a treaty provision. It is not concerned with the motives which may have inspired this request, nor with the considerations which, in the concrete cases submitted for examination to the Security Council, formed the subject of the exchange of views which took place in that body. . . .

'It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise.[1]

'Lastly, it has also been maintained that the Court cannot reply to the question put because it involves an interpretation of the Charter. Nowhere is any provision to be found forbidding the Court, "the principal judicial organ of the United Nations",[2] to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.

'Accordingly, the Court holds that it is competent, on the basis of Article 96 of the Charter and Article 65 of the Statute, and considers that there are no reasons why it should decline to answer the question put to it.'[3]

These passages were specifically referred to and reaffirmed by the Court in the (*Second*) *Admissions* case (*I.C.J.*, 1950, 6–7).

(v) *The consent of individual states who may be affected by a request for an opinion, or who may be involved in a dispute to which that request relates, is not necessary in order to enable the Court to give the opinion. The opinion is given not to states but to the organ requesting it.* In affirming the general position that the consent of individually interested states is not necessary in order to enable the Court to comply with the request for an advisory opinion, the Court made the following specific points: *first*, advisory opinions are merely advisory, not binding;[4] *second*, no state can prevent

that for the Court to 'interpret' this provision would be an essentially political act. It was equally contended that the abstract form of the question (i.e. that it did not ask whether a refusal to recommend the admission of a particular state on given grounds was proper or not) involved the Court (as Judge Krylov put it in an interesting statement of this view—see *I.C.J.*, 1948, 108) in giving an opinion which would have 'a quasi-legislative' effect.

[1] This point is worth special notice because it has frequently been maintained by delegates in organs of the United Nations that it is not proper or even practicable to put questions to the Court in abstract terms, and that questions should always be concrete and relate to a definite situation. Paradoxically, however, other delegates have equally objected to questions relating to definite situations being put, on the ground that they tend to involve a quasi-contentious, and not merely advisory, jurisdiction. Between these millstones the advisory jurisdiction of the Court would be ground to nothing. The Court in the (*First*) *Admissions* case, and again in the *Peace Treaties* case, clearly negatived both views. It should be noticed, however, that some of the individual Judges went even farther than the majority of the Court on the question of the propriety of answering abstract questions. Judge Azevedo, for instance, maintained that *all* requests for advisory opinions should be *framed* in abstract terms, even if in fact motivated by a concrete situation (see *I.C.J.*, 1948, 73–75, and ibid., 1950, 79 ff.).

[2] See subsection (i) above (pp. 45–46).

[3] The fact that the Court is *competent* to answer the question does not mean that it may not decline to do so if it considers there are reasons which would make compliance undesirable (see subsections (vi) and (vii) below, pp. 50–52).

[4] For the exact significance of this see below, section (*f*), p. 53, on the effect of advisory opinions.

the Court from giving an advisory opinion which the organ requesting it requires for the purposes of its work; *third*, the opinion is given to the requesting organ, not to states; *fourth*, the Court, being itself an organ of the United Nations, should not 'in principle' refuse to give opinions wanted for the purposes of the work of the Organization.[1] These points were made in the following passages from the *Peace Treaties* case (First Phase) (*I.C.J.*, 1950, 71):

'Another argument that has been invoked against the power of the Court to answer the Questions put to it in this case is based on the opposition of the Governments of Bulgaria, Hungary and Roumania to the advisory procedure. The Court cannot, it is said, give the Advisory Opinion requested without violating the well-established principle of international law according to which no judicial proceedings relating to a legal question pending between States can take place without their consent.[2]

'This objection reveals a confusion between the principles governing contentious procedure and those which are applicable to Advisory Opinions.

'The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases. The situation is different in regard to advisory proceedings even where the Request for an Opinion relates to a legal question actually pending between States. The Court's reply is only of an advisory character: as such, it has no binding force. It follows that no State, whether a Member of the United Nations or not, can prevent the giving of an Advisory Opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take. The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an "organ of the United Nations", represents its participation in the activities of the Organization, and, in principle, should not be refused.'[3]

A minority of the Court, consisting of Judge Azevedo (whose opinion was, however, technically 'separate' and not 'dissenting')[4] and Judges Winiarski, Zoričić, and Krylov, dissented strongly from this view, although it is not clear that they thought the Court actually non-competent so much as under a duty to *decline* jurisdiction in practice.[5]

[1] The same would presumably be applicable to the case of requests emanating from organs of specialized agencies authorized by the United Nations Assembly to make them.

[2] The request in the *Peace Treaties* case (First Phase) was whether disputes existed between certain of the Allied Powers and some of the ex-enemy states concerning the interpretation and application of certain clauses of the Peace Treaties, and if so whether the parties were under an obligation to submit these disputes to the arbitral commissions specified in the Treaties.

[3] But (see below) the Court went on to indicate that its obligation to give an opinion was not absolute or unlimited.

[4] Judge Azevedo's views were based not so much on any specific dissent as on his feeling (see above, p. 48, n. 1) that the questions put to the Court, even if arising because of a specific situation, should have been framed in abstract terms.

[5] The main general reasons for the views of the four Judges were the following:

(*a*) It was a general principle of international law that the consent of a state was necessary in some shape or form before it could be made a party to proceedings before an international tribunal. This was admitted as regards the Court's contentious procedure, and unless the same principle were applied in advisory cases—at any rate those having reference to disputes actually pending between states—it would be to introduce compulsory jurisdiction by the back door.

(*b*) Advisory procedure had always and of set purpose been assimilated to contentious

(vi) *Though the Court may be entitled to give an advisory opinion, it is not absolutely bound to do so and has a discretion to refuse.* The Court having stated (*vide* end of last quoted passage) that, as an organ of the United Nations, it ought not, in principle, to refuse to give an advisory opinion when requested, went on to qualify this statement as follows (*I.C.J.*, 1950, 71–72):

'There are certain limits, however, to the Court's duty to reply to a Request for an Opinion. It is not merely an "organ of the United Nations", it is essentially the "principal judicial organ" of the Organization (Article 92 of the Charter and Article 1 of the Statute). It is on account of this character of the Court that its power to answer the present Request for an Opinion has been challenged.[1]

'Article 65 of the Statute is permissive.[2] It gives the Court the power to examine whether the circumstances of the case are of such a character as should lead it to decline to answer the Request.'

In the two *Admissions* cases also, the Court (see subsection (iv), p. 47, above), in rejecting the view that it should decline to answer, did so in terms indicating, not that it was bound to decline, but that it could see no valid grounds for not complying with the request. The four-Judge minority in the (*First*) *Admissions* case (Judges Basdevant, Winiarski, McNair, and Read), took the same line (*I.C.J.*, 1948, 82). Judges Zoričić and Krylov, who thought jurisdiction should be declined, did not argue that the Court was incompetent, but that it could and should decline. Judge Krylov in particular (loc. cit. 109) said:

'Thus I conclude that it would be better if the Court were to assert its right not to answer the question put, and to state its grounds for so doing (Article 65 of the Statute says: the Court may give an advisory opinion . . .).'

In the *Peace Treaties* case the Court considered whether there was any

procedure by the present and the former Court—(an impressive array of facts and citations was adduced here).

(*c*) It was illusory to argue that the findings of the Court would constitute an opinion and be merely advisory and without binding character. This might be so in form, but in practice the opinion could not fail to settle the legal issues, purely as such, and to affect the position of the interested states.

(*d*) A distinction ought to be drawn between requests for opinions on abstract legal questions or interpretations of instruments such as the Charter, and requests relating to a concrete situation of fact involving issues or disputes between states, actually pending. These the Court ought to decline to deal with. Judge Azevedo (*I.C.J.*, 1950, 84–5) thought that requests for advisory opinions, even if made with a concrete situation of fact or a pending dispute between states in mind, should not directly refer to that situation or dispute, although the opinions, when rendered, might form the basis on which the legal rights and wrongs of the situation or dispute could be judged.

(*e*) When a request fell into the latter class, an opinion rendered in consequence of it could not have the character merely of advice given to the Assembly for its own purposes. It had a far wider scope and effect (see grounds (*c*) and (*d*)), and it could not be admitted that the matter was solely one between the Court and the Assembly.

[1] The challenge was to the effect that the Court could not act judicially if it proceeded in the absence, and without the consent, of the states affected.

[2] The relevant words read: 'The Court may give an advisory opinion on any legal question at the request . . .', &c.

reason why it should in fact decline to give an opinion. The argument that it should, had been based very largely on the analogy of the *Eastern Carelia* case where, in a somewhat similar situation, the former Permanent Court, without positively declaring itself non-competent, had declined to give any opinion.[1] As to this the Court said (*I.C.J.* 1950, 72):

'In the opinion of the Court, the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the *Eastern Carelia* case . . . when that Court declined to give an opinion because it found that the question put to it was directly related to the main point of a dispute actually pending between two States, so that answering the question would be substantially equivalent to deciding the dispute between the parties, and that at the same time it raised a question of fact which could not be elucidated without hearing both parties.[2]

'As has been observed, the present Request for an Opinion is solely concerned with the applicability to certain disputes of the procedure for settlement instituted by the Peace Treaties, and it is justifiable to conclude that it in no way touches the merits of those disputes.'[3]

[1] In the *Eastern Carelia* case Finland, a Member of the League of Nations, brought before the Council of the League a dispute between itself and the Soviet Union (not then a Member of the League), relative to the interpretation and application of a treaty concerning the border territory of Eastern Carelia, which had been ceded by Finland to Russia. The Council of the League asked the Permanent Court to give an advisory opinion on the point at issue, and the Soviet Union objected to the exercise of jurisdiction by the Court. The underlying gravamen of the objection was that by this means Finland would *in practice* procure a judicial pronouncement on a matter which could not otherwise have been submitted to judicial determination without Russia's consent.

[2] The Court did not deal further with this last point. It evidently considered that it had all the necessary material even without the appearance of the states concerned. All the facts *relative to the particular questions put to the Court* in the *Peace Treaties* case (i.e. as to the existence of a dispute and the obligation to submit it to arbitration under the Treaties), were apparent on the face of the diplomatic correspondence submitted to the Court, as were also the respective points of view of the parties.

[3] The minority Judges (Winiarski, Zoričić, Krylov, and Azevedo) did not agree with the Court in thinking the *Peace Treaties* case could be distinguished from the *Eastern Carelia* case. Their main views were as follows:

(i) It was irrelevant that the points referred to by the Court did not touch on the substantive questions of human rights at issue between the parties to the Peace Treaties, for there was also a secondary issue between the parties, namely, a dispute as to whether the primary issue constituted a dispute within the meaning of the disputes Articles of the Peace Treaties and fell to be settled under those Articles. This secondary issue had undoubtedly been referred to the Court, and, if the Court pronounced on it, it would be defining the legal position of the parties to the Peace Treaties in relation to this secondary dispute—in fact it would be doing something 'substantially equivalent to deciding the dispute [on this secondary issue] between the parties', which was exactly what the Permanent Court in the *Eastern Carelia* case had said ought not to be done. Moreover, of that case too it could be said that the immediate issue referred to the Permanent Court had been a preliminary one, not the underlying issue of substance—yet the Permanent Court declined to deal even with this preliminary issue.

(ii) The Permanent Court has also said that, being a court of justice, it must, even in giving an advisory opinion, act in a judicial manner. This was impossible in the absence of consent on the part of all the interested states, and of their appearance before the Court. True, the ex-enemies had been given the opportunity to appear under Article 66 of the Statute, but as they denied the competence of the Court altogether, this was irrelevant.

(iii) Nor could it be admitted that, in contradistinction to the circumstances of the *Eastern Carelia* case, the Court had all the facts before it, and did not need any more. Who could say but that the ex-enemies might not have produced further relevant material or information?

After referring to the faculty which the ex-enemy governments would have of raising any objections to the jurisdiction of the Peace Treaty Commissions before those commissions themselves, the Court concluded (*I.C.J.*, 1950, 72):

'It follows that the legal position of the parties to these disputes [i.e. the substantive disputes between the ex-enemies and certain of the Allied Powers about the human rights clauses of the Peace Treaty] cannot be in any way compromised by the answers that the Court may give to the Questions put to it.'

As to the effect of Article 68 of the Statute, the Court said (ibid.):

'It is true that Article 68 of the Statute provides that the Court in the exercise of its advisory functions shall further be guided by the provisions of the Statute which apply in contentious cases. But according to the same article these provisions would be applicable only "to the extent to which it [the Court] recognises them to be applicable".' It is therefore clear that their application depends on the particular circumstances of each case and that the Court possesses a large amount of discretion in the matter.'

Finally, the Court concluded (ibid.):

'In the present case the Court is dealing with a Request for an Opinion, the sole object of which is to enlighten the General Assembly as to the opportunities which the procedure contained in the Peace Treaties may afford for putting an end to a situation which has been presented to it.[1] That being the object of the Request, the Court finds in the opposition to it made by Bulgaria, Hungary and Roumania no reason why it should abstain from replying to the Request.

'For the reasons stated above, the Court considers that it has the power to answer . . . and that it is under a duty to do so.'

(vii) *Summary of the attitude of the Court as to complying with requests for advisory opinions. Grounds on which the Court might decline to give an opinion.* In the preceding subsection an account has been given of how the Court dealt with this matter in the *Peace Treaties* case. On the basis of that case and of the *Admissions* cases, it would seem possible to frame the following provisional estimate of the Court's attitude on this matter:

a. As an organ of the United Nations the Court considers that in principle it should comply with authorized requests from other organs, and in the *Peace Treaties* case it spoke of being under a duty to do so. Attention has already been drawn (see subsection (i) above) to the different position in this respect of the former Permanent Court, which was not an organ of the League of Nations.

[1] This was another ground of differentiation from the *Eastern Carelia* case, in which the League Council was not independently seised of any question affecting the territory concerned, so that the dispute between Finland and Russia was the very question brought before the Council. In the case of the General Assembly, it was not the Peace Treaties as such, or their application, which had been brought before it, but general charges of violations of human rights by the three ex-enemy Governments. The Peace Treaty issue arose because, as the Peace Treaties contained human rights clauses and laid down a procedure for dealing with disputes concerning them, it was a question whether this procedure should not be exhausted first, before the Assembly took any step itself; and the Assembly asked the Court to say whether in fact a legal obligation to have recourse to this procedure existed for the parties.

b. The Court considers that in principle it is entitled to answer any legal question, including any question of treaty interpretation, however framed, and that it is not precluded from doing so merely by reason of the fact that the opinion may affect the position of individual states or that the request relates to a pending dispute between two states and that these states object to the Court giving an opinion; or that the matter has political elements.

c. The Court does not consider itself to be directly concerned with the motives or considerations which have inspired any request, but clearly attaches importance to the request being bona fide required by the requesting organ for the purposes of its work.

d. This position suggests that the Court will normally comply with requests for advisory opinions provided the questions asked are legal questions, and indeed regards itself as prima facie under a duty to do so unless very strong grounds to the contrary can be adduced in any particular case.

e. At the same time, the Court has definitely stated that it has a discretion, and that there are limits to its duty in the matter; and it has also indicated the basis of principle on which it might feel obliged to decline, by drawing specific attention to the fact that the Court is not only a principal organ, but the principal *judicial* organ of the United Nations, in terms which suggest that it would not feel justified in giving an opinion in any case where it did not consider it would be acting judicially, i.e. in accordance with the basic judicial function, in so doing. Here, everything must depend on the circumstances of the case, but the following are suggested as possible classes of cases where the Court might feel that, even if the question put to it was a legal one, it would not be acting conformably with its essentially judicial role in answering it:

i. if the Court felt that it could not do substantial justice in the matter, e.g. because essential facts were lacking which could not be made available to the Court by the means at its disposal, or because the question was framed in an ambiguous or tendentious way;

ii. if the question, though in a sense legal, involved an essentially legislative and non-judicial task, e.g. to make proposals for altering the law on some subject, or for amending a treaty instrument;

iii. if the request related to something which had nothing to do with the work of the organ requesting it, and appeared to be directed to some ulterior purpose.

(*b*) *Effect of advisory opinions.* Whereas judgments of the Court in litigations between states are, under Article 59 of the Statute, 'binding . . . between the parties . . . in respect of that particular case', advisory opinions, as their name implies, are merely opinions and merely advisory, and as the

Court said in the passage quoted in section (*a*) (v) above, they are given not to states but to the organ which requested the advice. This position was confirmed by the Court in the *Peace Treaties* case (First Phase) when it said (*I.C.J.*, 1950, 71):

'The Court's reply [to a Request for an Advisory Opinion] is only of an advisory character: as such, it has no binding force.'

It seems nevertheless desirable to elucidate exactly what is meant when it is said that the advisory opinions of the Court have no '*binding*' *force*. It would be an error to conclude that they have no force at all, or that they may not have a force of a different character.

(i) *Advisory opinions, though not binding, nevertheless have authority as statements of law.* Though not binding in the sense of being mandatory or compulsive as regards the action which the opinion points to, it is none the less the case that advisory opinions are authoritative in the sense that their legal correctness cannot be officially or formally questioned by the organ to which they are rendered, acting in its corporate capacity. This follows inevitably from the character of the respective entities involved, and the circumstances in which requests for advisory opinions are addressed to the Court. An organ such as, for instance, the General Assembly, is not itself a juridical body. It asks the Court for an opinion precisely in order to obtain an authoritative statement of the law in cases where the Assembly is itself in doubt, and because the Court is, in the words of Article 92 of the Charter, 'the principal judicial organ of the United Nations'. There would accordingly be no point in the Assembly attempting to review or evaluate the opinion of the Court from a legal point of view, even if, as a body, it had the qualifications for so doing. Individual Member states, or jurists representing them in the United Nations or elsewhere, may indeed criticize the opinion as an individual or personal view, but it is not open to the organ which requested the opinion, and acting in its corporate capacity, to disagree with it on *legal* grounds, or expressly to base a refusal to follow it on such disagreement. The organ concerned need not *in fact* follow the opinion (subject to the point dealt with in the next subsection) since it is not 'binding'; but that is another matter, and there are of course almost always other factors, of a political, economic, or technical character, which must play a part in determining the action finally to be taken. The legal aspect is normally only one of those involved.

(ii) *Negative force of advisory opinions.* Although advisory opinions are not binding, there are two cases in which they would appear to be in practice negatively binding, i.e. to have prohibitory force, namely, *first*, where the opinion indicates that a certain course of action would be contrary to international law or to the Charter or to some other international

instrument—in such a case it would be virtually impossible for the requesting organ to follow that course, and difficult for any individual Member state to do so; *second*, where the opinion indicates that, of various possible courses, only one is the correct course legally—here again, if anything is done at all, it would appear difficult in practice not to follow the course advocated by the Court.

(iii) *Effect of advisory opinions on individual states.* Since, in the words of the Court, advisory opinions are sought by and rendered to the international organs entitled to request them and not states, it can be argued that no individual state is obliged to regard them as having even an authoritative character legally. Nevertheless, they must remain for all states the considered pronouncements of the 'principal judicial organ of the United Nations' and highest international tribunal in the world, and as such, whatever be their formal authority, their persuasive character and substantive authority must be great.

§ 4. Some General Questions relative to the Competence of International Tribunals

(*a*) *Competence of international tribunals to hear and determine objections to their own jurisdiction.* In the *Peace Treaties* case (First Phase) the Court confirmed this competence, and indicated that such tribunals were the proper forum before which questions of their competence ought to be brought. In brief, a party is not justified in refusing to go before an international tribunal to whom it has undertaken to submit a certain class of disputes because it questions the competence of the tribunal in the given case or claims, e.g., that no dispute has arisen. The proper course is to submit this point to the tribunal itself as a preliminary objection to its jurisdiction (as occurred, for instance, in the *Corfu* case). The Court said (*I.C.J.*, 1950, 72):

> 'Furthermore, the settlement of these disputes is entrusted solely to the Commissions provided for by the Peace Treaties. Consequently, it is for these Commissions to decide upon any objections which may be raised to their jurisdiction in respect of any of these disputes, and the present Opinion in no way prejudges the decisions that may be taken on those objections.'

(*b*) *Effect on the competence of a tribunal of* (*i*) *withdrawal of one of the members of the tribunal subsequent to its establishment*, (*ii*) *initial non-appointment of a member.* In the second phase of the *Peace Treaties* case, the Court had to consider the effect on the status of an international tribunal, or commission, of a refusal by one of the parties to appoint its representative on the commission, or to co-operate in appointing the third, 'neutral', member. The question was whether, under the relevant arbitration clause, application might in these circumstances be made to the Secretary-General of the United Nations to appoint this third member, and whether

he might comply, and if so whether a commission consisting of the Secretary-General's nominee and the representative of the co-operating party could hear the case and render a binding decision. It was suggested to the Court in argument that if the refusal of the other party was wrongful and in clear breach of the relevant treaty, it ought not to be allowed to frustrate the setting up of the contemplated commission, which should (if the parties concerned persisted in not appointing their representatives) proceed to function without them. In support of this, precedents were cited to show that tribunals could legitimately function even in truncated form, since a number of cases had occurred where, a party having (wrongfully) withdrawn its arbitrator after the establishment of the tribunal, the latter had nevertheless continued to function and had rendered decisions which were generally held to be valid.[1] The Court declined to accept this argument and distinguished the case of 'withdrawal' as follows (*I.C.J.*, 1950, 229):

'It has been pointed out that an arbitration commission may make a valid decision although the original number of its members, as fixed by the arbitration agreement, is later reduced by such circumstances as the withdrawal of one of the Commissioners. These cases presuppose the initial validity of a Commission, constituted in conformity with the will of the parties as expressed in the arbitration agreement, whereas the appointment of the third member by the Secretary-General [of the United Nations] in circumstances other than those contemplated by the [Peace] Treaties raises precisely the question of the initial validity of the constitution of the Commission. In law, the two situations are clearly distinct and it is impossible to argue from one to the other.'

In his dissenting Opinion Judge Read had some observations to make which are of interest on the general position of international tribunals. He said (*I.C.J.*, 1950, 242):

'There are three phases in the life of an arbitral tribunal. The first phase may be referred to as the constitution of the tribunal. At this stage the tribunal may deal with matters of some import, such as procedure. However, it consists largely of administrative and protocol matters. . . . The second phase is that in which the tribunal hears the evidence and arguments. The third phase includes deliberation and judgment. I do not need to emphasize the relative importance of the second and third phases, as compared with the first. I have suggested that the principle [i.e. that established by the 'withdrawal' precedents] is equally applicable to default at the outset [i.e. in appointing a representative]. As a matter of fact, the case for applying the principle to default at the outset is much stronger.'

Judge Read then expressed the view that it was much easier to regard the absence *ab initio* of one of the arbitrators as not affecting the tribunal's competence, than it was (after the withdrawal of one of the arbitrators) 'to construe an arbitration clause as indicating the intention of the parties that a

[1] See United States argument in *I.C.J.*, *Pleadings, Arguments and Documents*, 1950, 355–9; and United Kingdom argument in ibid. 376–7.

tribunal consisting of the third member and the representative of one party can hear the evidence and give a decision'. He continued (*I.C.J.*, 1950, 243):

> 'If a Treaty Commission—which, as the result of the withdrawal of a national representative, consists of the third member and the representative of the party which is not in default—is competent to hear the evidence and render a decision, it means that a Commission of two members is a "Commission". . . . The whole foundation of the contention that only a so-called three-member Commission can be a "commission" within the meaning of the Disputes Article falls to the ground.'

Judge Read's opinion on the point was, to a large extent, the consequence of his view that, in the given case, there was nothing to prevent the defaulting governments from still appointing their representatives at any time, and no ground for assuming that they would not do so 'if faced with appointments by the Secretary-General' of the third or neutral members of the commissions. Consequently there was no reason why the Secretary-General should not proceed. The Court, however, seems to have regarded it as certain that no appointments by the governments concerned would be made, so that appointments by the Secretary-General could only result in two-member commissions, which, in the Court's view, was not what the Peace Treaties contemplated.

Division B: Miscellaneous Matters of Procedure

§ 1. Counterclaims

In the *Asylum* case, one of the parties sought to amend its counterclaim during the oral proceedings by adding a new ground for it. This was contested on the score, *inter alia*, of being too late and in violation of Rule 63 of the Rules of Court which provides for the presentation of any counterclaim with the Counter-Memorial. This was not, however, strictly a case of a new claim, but of a fresh ground for an existing claim. In the event, the Court found it unnecessary to decide on the admissibility of the new ground, as it allowed the counterclaim on the original grounds (*I.C.J.*, 1950, 288).

§ 2. Evidence and Proof

In the *Corfu* case (Merits), and on one point in the *Asylum* case, the Court made some interesting observations on questions of evidence and proof, with particular reference to the onus of proof.

(*a*) *Charges of exceptional gravity against a sovereign state or its Government require to be established by conclusive evidence involving a high degree of certainty*. In the *Corfu* case there was a good deal of evidence, some of it the evidence of a witness, some of it circumstantial or inferential, tending to show that a minefield in Albanian waters had been laid by another

Power. While the Court accepted the fact that the mines could not have been laid by Albania, which did not possess the necessary means, and must have been laid by some outside agency (though, as the Court found, with Albania's knowledge), the Court could not accept as adequate the evidence pointing to a particular Power. The eyewitness evidence, it said, could be regarded 'only as allegations falling short of conclusive evidence', and the evidence founded on presumption led 'to no firm conclusion'. The Court also made the following general pronouncement (*I.C.J.*, 1949, 17): 'A charge of such exceptional gravity against a State would require a high degree of certainty that has not been reached here.'

(*b*) *Public statements made by governments on questions of law, or involving questions of law, are not conclusive evidence against them. It is for the Court to find the law.* In the *Asylum* case each of the parties sought to rely on official communiqués or reports issued by the other on previous occasions, in which different views had been expressed from those subsequently argued and maintained by the parties concerned. The Court, however, preferred to ignore these statements (*I.C.J.*, 1950, 278):

'. . . on the question of qualification, these documents state views which are contrary to those now maintained by these Governments. The Court, whose duty it is to apply international law in deciding the present case,[1] cannot attach decisive importance to any of these documents.'

(*c*) *Burden of proof in regard to the responsibility of a state for illegal occurrences in its territory.* In the section on 'Responsibility of States' in the first part of this study (see this *Year Book*, 27 (1950), pp. 19–23), reference was made to the finding of the Court that states could not be presumed to know of, or to have an absolute or automatic responsibility for, every illegal occurrence that took place within their national jurisdiction, merely by reason of its occurrence there. Nor did the occurrence of the event create *per se* for the territorial state the burden of proving that its authorities did not know of, or could not have prevented what happened. On the other hand, the Court found that such an occurrence did give rise *eo ipso* to certain consequential obligations and liabilities affecting material evidence and proof, resulting from the exclusive control exercised by the state in and over its territory, which (i) imposed on it a special obligation to explain or endeavour to explain what occurred there; and (ii) imposed special difficulties on other states in obtaining evidence regarding such occurrences.

(i) *States are bound to use their best endeavours to explain the occurrence in their territory of acts contrary to international law; and, if requested, to supply particulars of what inquiries they have made.* This seems a fair infer-

[1] An allusion to Article 38 of the Statute: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, . . .' etc.

ence from the following statement by the Court in the *Corfu* case (*I.C.J.*, 1949, 18):

'It is true, as international practice shews, that a State on whose territory or in whose waters an act contrary to international law[1] has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and enquiry at its disposal.'

(ii) *The exclusive control exercised by a state over its territory entitles other states to certain facilities and relaxations in the matter of proof as to occurrences there.* This principle was stated by the Court as follows (ibid.):

'On the other hand, the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion.'

(*d*) *Circumstantial evidence.* As will be seen from the preceding passage, the Court recognized the probative value and admissibility of circumstantial evidence, and thought that under certain conditions a claimant state must be allowed special recourse to this type of evidence. The proof, said the Court in another passage, 'may be drawn from inferences of fact, provided that they leave no room for reasonable doubt'. Judge Badawi Pasha also had some interesting remarks to make on the nature of circumstantial evidence, and their practical effect seems to lead to very much the same result as the Court's view that there must be no room for reasonable doubt. He said (*I.C.J.*, 1949, 59–60):

'. . . in international law, circumstantial evidence means facts which, while not supplying immediate proof of the charge, yet make the charge probable with the assistance of reasoning. The elements of such circumstantial evidence must be interpreted and associated in order to draw the relevant inferences and reconstruct the data on which the hypothesis of responsibility is founded. In this process of interpretation and association, there is a risk of committing errors of appreciation, of letting the imagination fill in the gaps in the evidence, or of reasoning in a specious manner. This method of evidence, which seeks or pretends to arrive at certainty, most often attains only a high degree of probability. The fact remains that under some legislations, circumstantial evidence must be weighty, accurate and concordant. On the other hand, the most reliable doctrine takes the view that "proof by circumstantial evidence is regarded as successfully established only when other solutions would imply circumstances wholly astonishing,

[1] This would seem to include any act prima facie contrary to international law, or at any rate requiring explanation from that point of view.

unusual and contrary to the way of the world". These rules must be a constant guide in weighing evidence.'

(*e*) *Disclosure of documents.* In the *Corfu* case the Court called upon the United Kingdom to produce certain documents, production of which had to be refused on grounds of naval security. Article 49 of the Statute (and see Rule 54 of the Rules of Court) enables the Court to call for the production of any document, and adds 'Formal note shall be taken of any refusal.' As the Court has no compulsory powers in the matter, the only sanction for non-production is the adverse effect it may have on the case of the party concerned, and it is to be presumed that no party would refuse production except for bona fide reasons of state security or high policy. In the *Corfu* case, the Court demonstrated that a refusal to produce is to be considered objectively and on its merits, and does not necessarily constitute *per se* a prejudice to the party concerned. The Court accepted the statement made on behalf of the United Kingdom that these documents related solely to a contingency which had not in fact occurred, and therefore had no direct bearing on the case. It added (*I.C.J.*, 1949, 32):

'The Court cannot . . . draw from this refusal to produce the orders any conclusions differing from those to which the actual events gave rise.'

§ 3. Damages

(*a*) *Competence of the Court to assess the amount of the damages where monetary compensation is due.* In the *Corfu* case, the Court in effect decided that it automatically had competence to assess the actual amount of the damages due in any case where, either by reason of the agreement of the parties or in the exercise of its compulsory jurisdiction, it had competence to say whether there was a duty to pay compensation by way of reparation. In the special agreement eventually concluded between the parties in that case, one clause asked the Court to determine whether one of the parties was 'under international law responsible' for certain occurrences, and the next whether, if so, there was 'any duty to pay compensation', but nothing was said as to assessing the amount. The Court held (*I.C.J.*, 1949, 23–24) that since it followed 'from the establishment of responsibility that compensation is due' it would have been superfluous to add the second clause 'unless the Parties had something else in mind than a mere declaration by the Court that compensation is due'. Applying the principle of effectiveness (see the second part of this study in this *Year Book*, 28 (1951), pp. 9 and 18–20), the Court said that it would be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement 'should be devoid of purport or effect'. It also interpreted the subsequent conduct of the parties as not indicative of any intention to preclude the assessment of damages (see the principle of

'subsequent practice' or conduct of the parties in the second part of this study: loc. cit., pp. 9 and 20–22). Finally, the Court considered that the object of the reference of the case to itself was that (loc. cit. 26) 'the whole dispute should be decided by the Court':[1]

'If, however, the Court should limit itself to saying that there is a duty to pay compensation without deciding what amount of compensation is due, the dispute would not be finally decided. An important part of it would remain unsettled.'

It may be noted that Judge Krylov, in dissenting on this point, considered that since the jurisdiction of the Court in the *Corfu* case was founded on the consent of the parties, the Special Agreement between them ought to be interpreted restrictively.

(*b*) *Mitigation of damages.* It would seem that the Court accepts the doctrine that extenuating circumstances may mitigate the extent of the damages or reparation due, for which there is authority in international law.[2] This seems to follow (i) from the Court's view, more than once expressed (see for instance this *Year Book*, 27 (1950), p. 6), that a breach of international law gives rise to a duty to make reparation; (ii) from its declaration in the *Corfu* case (*I.C.J.*, 1949, 35) that the action of British naval vessels in sweeping up a minefield in Albanian waters constituted a violation of Albanian sovereignty, but that 'this declaration . . . is in itself appropriate satisfaction', after setting out a number of factors which 'the Court recognizes . . . are extenuating circumstances for the action of the United Kingdom'. However, it is true that Albania had not asked for more than a declaration that there had been a breach of international law.

(*c*) *Measure of damages in claims for wrongful killing or disablement of an individual.* Although made in relation to claims by an international organization in respect of an injury to one of its agents in the course of his duties, the remarks of the Court on this subject in the *Injuries* case are of general application *mutatis mutandis*. It should, however, be noted that they referred not to a claim on behalf of the individual for the damage caused to him personally, or to his dependants, but to a claim by an international organization for the damage to itself (the same principles being applicable to claims preferred by states in respect of damage suffered by them through injury to persons in their service). The Court said (*I.C.J.*, 1949, 181):

'The Court is not called upon to determine the precise extent of the reparation which the Organization would be entitled to recover. It may, however, be said that the measure of the reparation should depend upon the amount of the damage which the

[1] It is true that this was with reference to the Security Council's recommendation for a reference to the Court, and to the parties' acceptance of that recommendation, but the principle is quite general.

[2] See the standard work on the subject, *Damages in International Law*, by Miss Whiteman of the American State Department, vol. i, p. 207.

Organization has suffered as the result of the wrongful act or omission of the defendant State and should be calculated in accordance with the rules of international law.[1] Amongst other things, this damage would include the reimbursement of any reasonable compensation which the Organization had to pay to its agent or to persons entitled through him. Again, the death or disablement of one of its agents engaged upon a distant mission might involve very considerable expenditure in replacing him. These are mere illustrations, and the Court cannot pretend to forecast all the kinds of damage which the Organization itself might sustain.'

§ 4. Procedure in Default of Appearance

In the *Corfu* case (Assessment of Compensation) the Court had occasion to apply Article 53 of the Statute, which provides that where one party fails to appear, or fails to defend its case, the other party may call upon the Court to decide the case in its favour, but that the Court must, before doing so, satisfy itself not only that it has jurisdiction 'but also that the claim is well founded in fact and law'. Interpreting this provision the Court said (*I.C.J.*, 1949, 248):

'While Article 53 thus obliges the Court to consider the submissions of the Party which appears, it does not compel the Court to examine their accuracy in all their details; for this might in certain unopposed cases prove impossible in practice. It is sufficient for the Court to convince itself by such methods as it considers suitable that the submissions are well founded.

§ 5. *Res Judicata*

The principle of *res judicata* was applied by the Court in the *Corfu* case (Assessment of Compensation) as follows (ibid. 248):

'. . . the Albanian Government disputed the jurisdiction of the Court with regard to the assessment of damages. The Court may confine itself to stating that this jurisdiction was established by its Judgment of April 9th, 1949; that, in accordance with the Statute (Article 60), which, for the settlement of the present dispute, is binding upon the Albanian Government, that Judgment is final and without appeal, and that therefore the matter is *res judicata*'.

It is proposed to reserve comment on this matter until the second cycle of articles on the Court's jurisprudence, when it will be considered in connexion with the pronouncements of the Court on *res judicata* in the third phase of the *Asylum* case (June 1951)—see introductory paragraph of the present article.[2]

[1] For these see Whiteman, op. cit., *passim*.

[2] The reader may, however, be referred to the interesting Note on the subject by Mr. S. Rosenne, of the Israeli Ministry of Foreign Affairs, in this *Year Book*, 28 (1951), pp. 365–71.

THE GENERAL ASSEMBLY AND THE SECURITY COUNCIL OF THE UNITED NATIONS

By F. A. VALLAT

I

(*a*) *Introduction*

THE purpose of this article is to give a picture, from a lawyer's point of view, of the relations between the General Assembly and the Security Council of the United Nations. To draw this picture in full detail it would be necessary to trace the whole history of the source and origin of the Organization, the political and security provisions of the United Nations Charter, and the history of the United Nations in the political field since its establishment. To do justice to the task and to the material available would require a book of several chapters. Within the scope of an article it is only possible to outline the main features and to indicate the high-lights. Naturally, this must result in dogmatic statements where often caution and qualification would be nearer the truth. Accordingly, what follows should be read as the personal views of the author, even where statements are made with the firmness of assured fact.

(*b*) *Historical background*

The League of Nations foundered on the rocks of war and the United Nations emerged amidst the storms and aftermath of war. The initial impetus for the creation of the new Organization was given by the desire to prevent the recurrence of the tragedy of another world war. President Roosevelt and Mr. Churchill, Prime Minister, made a declaration of principles in the Atlantic Charter, signed as early as 14 August 1941,[1] which expressed the hope for the establishment of a peace which would afford all nations the means of dwelling in safety within their own boundaries, and the belief that all the nations of the world, for realistic as well as spiritual reasons, must come to abandon the use of force. This was followed by the Declaration by the United Nations[2] on 1 January 1942 reaffirming the purposes and principles of the Atlantic Charter. The next step was a declaration by the United States of America, the United Kingdom, the Soviet Union, and China on 30 October 1943,[3] which was directly linked with the United Nations Declaration of January 1942. It recognized the necessity of ensuring a rapid and orderly transition from war to peace, and

[1] See Goodrich and Hambro, *Charter of the United Nations* (revised ed., 1949), p. 569.

[2] These were the nations engaged in 'the struggle for victory over Hitlerism': for a list of the signatories and adherents and the text of the Declaration see Goodrich and Hambro, op. cit., p. 570.

[3] Op. cit., p. 571.

of establishing and maintaining international peace and security with the least diversion of the world's human and economic resources for armaments. The four nations recognized the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, for the maintenance of international peace and security. Thus, at the height of the war the four Powers formulated the principles and main objective of an international organization to be established as soon as possible.

For this purpose, the Dumbarton Oaks Proposals[1] were drafted by the United States, the United Kingdom, and the Soviet Union at Washington in the autumn of 1944 while hostilities were still raging. The initiative lay with the Great Powers who were to form the kernel of the Security Council, and their interests were focused on peace and security.

The first purpose of the Organization stated in the Dumbarton Oaks Proposals was 'to maintain international peace and security', and the proposed powers of both the General Assembly and the Security Council centred on the same purpose. The Assembly was to have the right 'to consider *the general principles of co-operation* in the maintenance of international peace and security'. It was also to have power to discuss and make recommendations on any questions relating to the maintenance of international peace and security brought forward by Members of the Organization or by the Security Council. But the Council was to have *primary responsibility* for the maintenance of international peace and security in order to ensure prompt and effective action to that end. The main difference in the roles proposed for the two organs was this: in the case of the Assembly, emphasis was laid on discussion and general principles; the Council was to have effective powers—it was to be the real guardian of the peace.[2]

(*c*) *The San Francisco Conference*

The San Francisco Conference met in the early summer of 1945 to draft the Charter of the United Nations on the basis of the Dumbarton Oaks Proposals. The Conference was conscious of the failure of the League of Nations to prevent war. That failure was commonly attributed to the ineffectiveness of the so-called automatic sanctions under the Covenant of

[1] Goodrich and Hambro, op. cit., pp. 572 ff.

[2] In the Dumbarton Oaks Proposals there was a clear departure from the example of the League of Nations. Under the Covenant of the League, both the Assembly and the Council had powers covering the whole sphere of action of the League or affecting the peace of the world. It is true that the powers of the Council were spelled out in greater detail, but the language conferring general functions was identical and, as a consequence, the Assembly and the Council could both act on the same matters. In theory, they could act independently but, since all members of the Council were members of the Assembly and the rule of unanimity applied to both organs, there was no possibility of serious conflict between them. See Articles 3 and 4 of the Covenant of the League of Nations.

the League of Nations, and the inability of the League to take military measures.[1] The Council of the League was given power merely to recommend to the governments concerned what effective military, naval, or air force the Members of the League should severally contribute to the armed forces to be used to protect the Covenant. The Council had no power to take or to determine the measures that should be taken against a Member going to war in breach of the Covenant. The Dumbarton Oaks Proposals and the Charter as drafted at San Francisco were intended to overcome the ineffectiveness of the Covenant to prevent or suppress aggression.

It was believed that the Security Council would be the proper organ for this purpose. It was to have real power, power of decision and power of action, and, so that realities should be taken into account, those states with the military strength to maintain peace were to have a position of predominance in the Council. With the great concern of the sponsoring governments at the San Francisco Conference to ensure the preservation of the peace and the belief that the Council would be the instrument for this purpose, there was a concentration of pressure in favour of the Security Council. More attention seems to have been paid at the Conference to the Council, its structure, procedure, and powers, than to the General Assembly itself.

Yet many states at San Francisco, particularly the smaller Powers, approached the creation of the new organization in a different spirit. They were motivated by the theory that it was more important to remove the causes of war than to provide for means to put down aggression after its outbreak. They believed that the causes of war were largely economic and social, and they were concerned to make effective the powers and functions of the Organization not only in the field of security, but more generally in the whole field of human progress. Among the smaller Powers it was also realized that the Assembly would be the organ on which they would all be represented. It would be the only forum in which each of them could be sure of a voice and a vote. Accordingly, they were anxious to extend the field of the Assembly as much as possible so long as their individual sovereignty was fully recognized.

The broad intention of the majority of delegations at the San Francisco Conference was probably well summarized by the Rapporteur of Commission II (General Assembly) when presenting its report to the plenary session.[2] He said that the Assembly would be empowered to discuss any

[1] By Article 16 of the Covenant, upon resort to war in breach of the Covenant Members of the League undertook immediately to apply economic sanctions. An amendment to the Covenant gave the Council power to recommend the date for the application of economic pressure under the Article, or to postpone the coming into force of the measures for a specified period.

[2] United Nations Conference on International Organization (hereinafter cited as U.N.C.I.O.), *Documents*, vol. 1, p. 621.

questions or matters falling within the scope of the Charter, or relating to the powers and functions of any organ provided for in the Charter. 'Thus', he said, 'in the clear light of public scrutiny, the town meeting of the world may consider problems of universal import to the end that peace and security may be preserved. Except in the case of situations which are being dealt with by the Security Council in discharge of its special responsibilities for taking action to preserve the peace, the General Assembly will have authority not only to discuss these great problems, but to make recommendations concerning them to the Security Council or to the member governments, or both.'

The Delegate of the Soviet Union, speaking at the final plenary session of the Conference, viewed the Charter from a somewhat different angle.[1] The possibility of a resurgence of German aggression loomed large in his thoughts. The United Nations should be able to nip war in the bud if it should break out again. He looked to the Security Council as the organ to do this by acting on behalf of all the Members of the United Nations. He regarded the unanimity of the Great Powers, who would have permanent seats on the Council, as an indispensable condition of effective action by the Organization. He gave second place to the General Assembly, which would do no more than make an important contribution to the cause of the maintenance of peace and security.

It is not surprising that these different approaches left their mark on the Charter of the United Nations. Their influence can be traced through the San Francisco Conference, through the Charter, and through the activities of the Organization since its establishment.

(*d*) *The problem of interpretation*

The structure of the San Francisco Conference, with its subdivision into four main commissions and a large number of committees and subcommittees, was likely to produce inconsistencies and deficiencies in the final text. The result was inevitably a document over-simplified in some respects and unnecessarily complex in others. It is a document that defies interpretation according to normal legal canons of construction. A critical examination of the text shows the possibility of a variety of interpretations of many crucial provisions.[2] Nevertheless, for those who are concerned with the operation of the Organization there is no virtue in seeking to magnify the difficulties and complexities. Fundamentally, the Charter is a constitution and it is better treated as such rather than as a bilateral agreement or legislative convention.

It is perhaps unfortunate that no provision was made in the Charter

[1] U.N.C.I.O., *Documents*, vol. 1, p. 662.
[2] See, for example, Kelsen, *The Law of the United Nations* (1950).

for its own authoritative interpretation. The question was raised in Committee II/2 of the San Francisco Conference whether the General Assembly should have sovereign or exclusive competence to interpret the Charter.[1] The question was referred to Committee IV/2 (Legal Problems). The only outcome was Article 96 of the Charter enabling both the Assembly and the Security Council to request advisory opinions from the International Court of Justice. Otherwise, the Charter is silent on the question of interpretation. It is presumably left to each organ of the United Nations to determine the interpretation and application of the Charter within its own field. Whether the interpretation of any provision followed by the Assembly or the Council is binding on the Members of the Organization or, indeed, in the latter case, on the members of the Council, is debatable. Nevertheless, the interpretation by those organs must have great, if not legally binding authority. This is so, in particular, where an advisory opinion of the International Court has been obtained and accepted. Consequently, if we are to understand the real nature of the relations between the Assembly and the Council, we must look not only to the text of the Charter itself, but also to the practice of those two organs and, where available, to the advisory opinions of the International Court. Some help may be obtained from the records of the San Francisco Conference,[2] but, as has often been said, they must be used with caution. To a considerable extent the evidence of intention which they provide is fragmentary and conflicting. They are often more useful to show what was not done or what was not intended than to show the positive intent of the language written into the Charter.

In practice, both the General Assembly and the Security Council act on their own *ad hoc* interpretations in each case. This assumption of the power of interpretation includes questions of competence. There is, accordingly, no restraining influence, other than the self-restraint of members, to limit the interpretation which those organs place on their own competence. Representatives usually, but not invariably, respect the plain language of the Charter, but where there is room for doubt there is a natural tendency —especially in the General Assembly, where the veto does not apply—to extend rather than to restrict competence. This need not distress the jurist so long as the language of the Charter is capable of bearing the interpretation placed upon it, but the process of *ad hoc* interpretation is sometimes confusing for him because the Assembly and the Council do not always indicate the Articles of the Charter on which they rely.

[1] Eleventh meeting of Committee II/2 (General Assembly—Political and Security Functions), U.N.C.I.O., *Documents*, vol. 9, p. 74.

[2] For a recent consideration of the value of *travaux préparatoires* see Fitzmaurice, 'Law and Procedure of the International Court of Justice', in this *Year Book*, 28 (1951), at pp. 10 ff.

(*e*) *Comparison with national institutions*

The various pressures and differing concepts, the conflict of interest and the common desires of the founders of the United Nations, account in large measure for the lack of precision in defining the exact relationship which should exist between the General Assembly and the Security Council. It would be a mistake to look for any short definition or explanation of the relationship. Moreover, it is not possible to draw any simple analogy between them and the organs of a state. The Assembly and the Council and the relationship between them are international in character, and as compared with national institutions they are something novel.

In seeking comparison with national institutions it is easier to say what the General Assembly and the Security Council are not, than to say what they are. They do not correspond to a legislature and an executive. They are not given powers to legislate in the field of international law. Indeed, the suggestion that they should be given such powers was expressly negatived at San Francisco.[1] The Council is given certain executive powers, that is to say, it can take action to prevent breaches of the peace, but it has none of the normal attributes of the executive of a government. It does not control and direct the administration. It does not in general formulate policy for the guidance of the Assembly. It is not designed to carry out or give effect to policies formulated by the Assembly. It is not subject to the control of the Assembly, nor, except indirectly through the obligations of individual Members, is the Assembly placed under the control of the Council.

II

(*a*) *Composition and voting rules of the General Assembly and the Security Council*

The claim of the General Assembly to the broadest possible functions has, since the days of the San Francisco Conference, been based upon its representative character. All Members of the United Nations are represented in it on an equal footing.[2] Each has one vote.[3] There is no veto. A two-thirds majority of the Members present and voting is required on important questions within the meaning of Article 18 of the Charter. All other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, require only a simple majority.[4]

The Security Council, on the other hand, is a body of restricted membership.[5] Of the eleven members, only six are elected by the General Assembly.

[1] Committee II/2, 10th meeting: U.N.C.I.O., *Documents*, vol. 9, p. 70.

[2] Article 9 of the Charter of the United Nations (Articles of the Charter are hereinafter cited as follows: Ch. Art. 9).

[3] Ch. Art. 18 (1).

[4] Ch. Art. 18 (3).

[5] Ch. Art. 23.

The remaining seats belong to the five permanent members.[1] The six elected members may reflect the views of the majority in the Assembly, though there is no guarantee of this, and the requirement that they should be elected with due regard to 'equitable geographic distribution' may operate against a true reflection of the political views of the majority in the Assembly. Moreover, the numerical majority of six elected members in the Council cannot secure the adoption even of procedural motions without the support of the positive vote of at least one of the permanent members. The most they can do is to block the adoption of any resolution or motion by five negative votes or abstentions. This follows from the voting rule which requires seven affirmative votes including, in the case of all non-procedural matters, the concurring votes of the permanent members.[2] This means that the Assembly cannot, through the instrumentality of the elected members, control the Council. It may be able to exercise a moral influence, but in the Council the will of the permanent members predominates and the Council can be frustrated in all but procedural matters by the negative vote of any one of the permanent members. Of course, the fact that all members of the Council are also members of the Assembly goes a long way towards removing the risk of positive conflict between the two organs. Nevertheless, their different voting rules make such conflict possible.

In the General Assembly, the adoption of a resolution is comparatively easy. If an item is placed on the agenda, some resolution is usually adopted under it. In the Security Council, the system of voting—both the veto and the effect of five negative votes or abstentions—gives a bias against the adoption of any motion or resolution. This difference was well illustrated by the history of the Tunisian Question. In April 1952, eleven states, one

[1] These are the Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America—Ch. Art. 23 (1).

[2] Ch. Art. 27, which reads as follows:

'1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of seven members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.'

The difficulty of securing the required seven affirmative votes for the adoption of a resolution by the Security Council is increased if it is dealing with a dispute to which one or more members of the Council are parties. This follows from the provision in Article 27 (3) that a party to a dispute shall abstain from voting. The effect of this rule is curious. It does not alter the voting position in the Council if the parties to the dispute are not members of the Council. In theory, on the other hand, it would be impossible for the Council to adopt any resolution with respect to a dispute if five or more members of the Council were parties to it. No doubt, in these circumstances, the Council would find some way round the difficulty, for example, by treating the matter as a 'situation' rather than as a 'dispute'.

of which was a member of the Security Council, brought the situation in Tunisia to the attention of the Council under Article 35 (1) of the Charter. There was considerable debate as to whether the item should be placed on the agenda of the Council, but it failed of adoption by five votes in favour, two against, with four abstentions.[1] Since the adoption of an agenda item is a procedural matter, seven favourable votes would have been sufficient. Therefore the item was lost not because of the two negative votes of France and the United Kingdom but because of the failure to obtain the necessary seven votes. A vote in similar proportions in the General Assembly would be sufficient for the adoption either of the agenda item or of a resolution.[2] At the Seventh Session of the Assembly not only was the Tunisian item readily placed on the agenda, but a resolution touching the substance of the question was adopted by forty-four votes to three, with eight abstentions.[3]

(*b*) *Functions and powers of the General Assembly and the Security Council*

In theory, it should be possible to classify the functions of the General Assembly and the Security Council as exclusive, concurrent, or joint. Although it is helpful to bear this classification in mind, it cannot be readily applied to the provisions of the Charter. A better picture is obtained by considering together the functions of both organs, whether exclusive or concurrent. The joint functions, such as the admission of new Members, do lend themselves to separate treatment. Later, some of the problems arising out of Article 10 and other Articles of the Charter, giving functions and powers to the Assembly and the Council, will be examined in more detail.[4] In order to give an overall picture, there follows here a résumé of the functions and powers given to them by the Charter.

(i) *Exclusive and concurrent functions and powers.* The General Assembly has functions in the economic, social, and cultural field[5] and, broadly speaking, in the field of non-self-governing[6] and trust territories[7] which the Security Council does not possess. There is an exception in the case of trusteeship over strategic areas. In that case, Article 83 of the Charter stipulates that all the functions of the United Nations shall be exercised by the Security Council. The Security Council is required to avail itself of the assistance of the Trusteeship Council in the performance of part of those functions but is independent of the Assembly in the exercise of its

[1] Security Council, 576th meeting, 14 April 1952.

[2] The reason for the difference is that, in the General Assembly, Members which abstain from voting are considered as not voting and their abstention has no effect on the numerical result of the vote. (Rule 86 (125) of the Rules of Procedure of the General Assembly.)

[3] General Assembly Resolution 611 (VII), adopted on 17 December 1952. (General Assembly Resolutions are hereinafter cited as follows: G.A. Res. 611 (VII), 17 December 1952.)

[4] See pp. 96–99, below.

[5] Article 13 (1) (*b*) and Chapters IX and X of the Charter of the United Nations.

[6] Chapter XI of the Charter.

[7] Article 16 and Chapters XII and XIII of the Charter.

functions with respect to strategic areas.[1] Presumably, the Assembly is excluded from exercising any functions in relation to those areas, notwithstanding the broad terms of Article 10 of the Charter.

Article 10 itself is of paramount importance.[2] It confers on the General Assembly functions as wide as the Charter. The powers of the Assembly are limited to discussion and recommendation, but it can discuss any questions or matters within the scope of the Charter—including anything that can be discussed by the Security Council—and, except as provided in Article 12, may make recommendations on any of those questions or matters.

Under Article 11 (1) the General Assembly may consider and make recommendations with regard to the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments. By Article 13 (1) (*a*), the Assembly is to initiate studies and make recommendations for the purpose of promoting international co-operation in the political field and encouraging the progressive development of international law and its codification. The Security Council is given no general function with respect to the principles of international co-operation but, by Article 26, is responsible for formulating plans for the establishment of a system for the regulation of armaments. It is difficult to say with certainty what is the effect of the distinction between principles governing disarmament and the regulation of armaments, which are within the competence of the Assembly, and the formulation of plans for the regulation of armaments, which is the task of the Council. In fact, the distinction has tended to become blurred and of decreasing significance.[3]

Under Article 11 (2) the Assembly may discuss and, subject to the provisions of the Article, make recommendations with respect to questions relating to the maintenance of international peace and security.[4] This provision makes it clear that the General Assembly has power to consider specific questions relating to peace and security but it may add nothing to its competence under Article 10. There is, however, this distinction:

[1] Ch. Arts. 83 and 85.

[2] Ch. Art. 10 reads as follows: 'The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.'

[3] See pp. 85–87, below.

[4] Ch. Art. 11 (2) reads as follows: 'The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such question to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.'

Article 10 says that recommendations may be made to 'the Members of the United Nations or to the Security Council or to both', whereas Article 11 (2) provides that the Assembly may make recommendations 'to the state or states concerned or to the Security Council or to both'. Moreover, Article 11 (2) provides for disputes to be submitted to the Assembly by non-Member states in accordance with Article 35 (2). There is no corresponding provision in Article 10. Therefore, it would appear that, if a dispute is brought before the Assembly by a non-Member state under Article 35 (2), it must be dealt with in accordance with and subject to the limitations of the provisions of Article 11 (2).[1]

By the provisions of Article 14, the Assembly is also authorized to recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations.

By Article 24 (1), the Security Council is given primary responsibility for the maintenance of peace and security. Therefore, it is natural that Articles 10, 11 (2), and 14 are all subject to the provisions of Article 12 (1), which prohibit the Assembly from making any recommendation with regard to a dispute or situation in respect of which the Council is exercising its functions, unless the Council so requests. Moreover, under paragraph 2 of Article 11, any question dealt with by the Assembly under the provisions of that paragraph 'on which action is necessary' shall be referred to the Council by the Assembly either before or after discussion. The primary responsibility of the Security Council is further emphasized by the provision of paragraph 3 of Article 11, which authorizes the Assembly to call the attention of the Council to situations which are likely to endanger international peace and security. The functions and powers of the Council are mentioned generally in Article 24 and set out in detail in Chapters VI (Pacific Settlement of Disputes), VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression), and VIII (Regional Arrangements). The functions of the Council with respect to trusteeship of strategic areas, under Chapter XII, have been mentioned above[2] and call for no further consideration here. It is not intended in this article to discuss all the technical problems that may arise in relation to the competence of the Council.[3] It will suffice to indicate, more or less in the

[1] The view that non-Member states have no right to bring questions before the General Assembly except as a dispute under Ch. Arts. 11 (2) and 35 (2) is confirmed by the Assembly's Rules of Procedure. Under Rule 13 the only category of questions which non-Member states may propose for inclusion on the provisional agenda of a regular session of the Assembly is that of disputes under Ch. Art. 35 (2).

[2] See above, p. 70.

[3] Many difficult questions of interpretation can arise under Ch. Arts. 33–38 which relate to disputes and situations. The distinction between a 'dispute' and a 'situation' is itself a very subtle problem. See generally Kelsen, op. cit., pp. 372 ff., Goodrich and Hambro, op. cit., chap. vi, and

language of the Charter, what its functions and powers are. As noted above, Article 24 gives the Council primary responsibility for the maintenance of international peace and security. By the same Article, Members of the United Nations agree that in carrying out its duties under this responsibility the Council acts on their behalf. By the provisions of Article 25, they further agree to accept and carry out the 'decisions' of the Security Council in accordance with the Charter. Under Article 33, the Council shall, when it deems necessary, call upon the parties to a dispute, which is likely to endanger the maintenance of international peace and security, to settle it by the peaceful means mentioned in paragraph 1 of that Article. By Article 34, the Council is expressly given power to investigate any dispute or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security. There seems little doubt that the General Assembly has a similar power of investigation. Such a power is not conferred expressly, but must be implicit in its general functions and powers which could not otherwise be effectively exercised.[1] There is, however, this difference. The Assembly has to rely on the voluntary co-operation of a state in carrying out any investigation on its territory. It is possible in the case of the Council, on the other hand, that a decision to investigate taken under Article 34 would be a decision within the meaning of Article 25 so as to create an obligation on Members of the United Nations to carry it out. Article 35 provides for disputes and situations to be brought before the Council or the Assembly. Articles 36, 37, and 38 deal rather with the powers than with the functions of the Council. They state what the Council may do with respect to disputes and situations in various circumstances. The limitations on the Council implicit in these Articles do not apply to the Assembly. Thus, under Article 36, the Council is entitled to recommend appropriate procedures or methods of adjustment, and it is only when the Council deems that a dispute is in fact likely to endanger the maintenance of international peace and security that it is entitled to recommend terms of settlement (Article 37), except at the request of all the parties to the dispute (Article 38).[2]

It is principally by Chapters VII and VIII that the Security Council is given powers not conferred on the General Assembly. By Article 39, the Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42

Liang, 'The Settlement of Disputes in the Security Council: The Yalta Voting Formula', in this *Year Book*, 24 (1947), p. 330.

[1] Cf. Kelsen, op. cit., pp. 166 ff.

[2] Cf. Ch. Art. 14, by which the General Assembly is given authority to recommend measures for the peaceful adjustment of any situation 'which it deems likely to impair the general welfare or friendly relations among nations'.

to maintain or restore international peace and security. The Assembly is given no corresponding power to determine the existence of threats to the peace, breaches of the peace, or acts of aggression (or, of course, to '*decide* what measures *shall* be taken'). Nevertheless, it would appear to have an inherent power to find that such a threat, breach or act does exist. Otherwise, the Assembly would be unable to exercise its general functions to make recommendations under either Article 10 or Article 11 (2) in those cases in which recommendations depend upon such a finding. Again, there is a distinction in this respect between the Council and the Assembly, because the determination by the Council may be a decision with binding effect under Article 25, whereas a finding by the Assembly has no binding effect except, possibly, on those Members which vote for it.[1] There may also be a distinction between the effect of recommendations made by the Council under Article 39, and recommendations by the Assembly. It is thought, however, that the better view is that a recommendation by the Council has only the ordinary quality of a recommendation and has not, of itself, any binding force. This seems to be the intention of Article 39 because the words 'recommendations' and 'decide' are placed in apposition to one another.

Articles 40, 41, and 42 clearly give the Security Council powers not enjoyed by the General Assembly. Thus, Article 40 empowers the Council, before making the recommendations or deciding upon the measures provided for in Article 39, to call upon the parties concerned to comply with provisional measures. Under Article 41, the Council may decide what measures, not involving the use of armed force, are to be employed to give effect to its decisions. These may include economic and diplomatic sanctions. Article 42 gives the Council power to take action by military force. It is, however, at the point where the powers of the Council depart from those of the Assembly that the weakness of the Council manifests itself. If there were agreement in the Council, it could exercise its powers under Articles 40 or 41, but it appears that the Council cannot take measures under Article 42 until such time as special agreements for the provision of armed forces are made under Article 43. There is no immediate prospect of any such agreements being made. For the time being, therefore, the possibility of military measures under Article 42 and the subsequent Articles of the Charter can be left out of consideration. Nevertheless, it is important to note that the inherent right of individual or collective self-defence is expressly preserved by Article 51 because, in the view of many, it is this right, coupled with the power of recommendation possessed by the Assembly,

[1] This statement appears to be broadly true, but the legal implications of a finding of aggression made by the General Assembly remain to be explored. For a useful study of the effect of Assembly resolutions see Blaine Sloan, 'The Binding Force of a "Recommendation" of the General Assembly of the United Nations', in this *Year Book*, 25 (1948), p. 1.

which may enable the Assembly to fill the gap left by a failure of the Council to exercise its functions in dealing with aggression. The distinction between an Assembly recommendation and a Security Council decision cannot be emphasized too strongly in this connexion. As has already been noted above, the general rule is that the Charter places no obligation upon Member states to carry out recommendations of the Assembly, but it does place an obligation on them to carry out decisions of the Council.

In present circumstances, it is unlikely that the Security Council will be able to exercise its functions with respect to regional arrangements. Since, however, the possibility does exist, these functions should be noted in passing. They are not shared by the Assembly except so far as the Assembly may be able to discuss and make recommendations by virtue of its general functions. By Article 52 (3), the Security Council shall encourage the development of pacific settlement of local disputes through regional arrangements or regional agencies. By Article 53, the Council shall, when appropriate, utilize regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Council, except measures against an 'enemy state' in certain circumstances.[1]

The Security Council is also given special power with respect to judgments of the International Court. By Article 94, if a party to a case fails to perform its obligations under a judgment of the Court, the Council may make recommendations or decide upon measures to be taken to give effect to the judgment. Failure to comply with such a judgment is certainly a matter within the scope of the Charter which the Assembly could discuss, and on which it could make recommendations. In the case of the Security Council, however, Article 94 seems to go further by enabling it to decide upon measures. A decision by the Council, under that provision, appears to fall within Article 25 and, accordingly, to be binding on the Members of the United Nations.

By Article 96, either the General Assembly or the Security Council may request the International Court to give an advisory opinion on any legal question. Having regard to the overlapping functions of the Assembly and the Council, this could lead to differently framed requests from the two organs on the same subject. Article 96 also leaves it to the Assembly alone to authorize other organs of the United Nations, or specialized agencies, to request advisory opinions of the Court on legal questions within the scope of their activities.

It remains to note that certain functions are assigned exclusively to the Assembly. It is the financial authority of the Organization. Article 17 gives

[1] Ch. Art. 53. The term 'enemy state' as used in that Article applies to any state which during the Second World War was an enemy of any signatory of the Charter.

the Assembly the power to consider and approve the budget of the Organization and to apportion its expenses among the Members. By the same Article, the Assembly is also given certain powers with respect to the finances of the specialized agencies. The Council has no financial powers. The staff of the Organization is placed indirectly under the authority of the Assembly. The adoption of staff regulations governing the terms and conditions of employment of members of the Secretariat is solely its responsibility.[1] Finally, under Article 105, the Assembly is the sole authority on the privileges and immunities of the Organization and its officials and of the representatives of Members. It may make recommendations or propose conventions for the determination in detail of those privileges and immunities.

(ii) *Joint functions and powers.* Having reviewed those functions and powers of the General Assembly and the Security Council which may be regarded as either concurrent or exclusive, the functions and powers which they exercise jointly will now be mentioned. By the provisions of Articles 4, 5, and 6, admission of new Members, suspension from the exercise of the rights and privileges of membership, and expulsion of Members may be effected 'by the General Assembly upon the recommendation of the Security Council'. In the case of suspension, the rights and privileges may be restored by the Security Council alone.

The expression[2] 'by the General Assembly upon the recommendation of the Security Council' appears in two other places in the Charter. It is the formula applied to the determination of the conditions on which a state, not a Member of the United Nations, may become a party to the Statute of the International Court.[3] It is also applied to the appointment of the Secretary-General.[4]

The Assembly and the Council are also jointly responsible for the election of the judges of the International Court.[5] For this purpose, states which are parties to the Statute of the Court but are not Members of the United Nations may be permitted to participate in electing the judges. The conditions for such participation may be laid down by the Assembly upon a recommendation of the Council.[6] The two organs proceed independently of one another to elect the members of the Court.[7] Those candidates who obtain an absolute majority of votes in the Assembly and in the Council are considered as elected.[8] Therefore, six votes are sufficient for election in the Council, and the veto does not apply.

Among the joint powers of the Assembly and the Council may also be

[1] Ch. Art. 101 (1).
[2] For discussion of the effect of this expression see below, pp. 102–4.
[3] Ch. Art. 93 (2). [4] Ch. Art. 97.
[5] Article 4 (1) of the Statute of the International Court of Justice.
[6] Ibid., Article 4 (3). [7] Ibid., Article 8. [8] Ibid., Article 10 (1).

included those with respect to the amendment of the Charter. These are important in preserving the legal position of the Council under the Charter because the permanent members are in effect given the power to veto any amendment of the Charter. The relevant provisions are contained in Articles 108 and 109. In essence, the provisions of both Articles are the same: they permit amendments of the Charter to come into force upon ratification by two-thirds of the Members of the United Nations, including all the permanent members of the Security Council. The difference between the two Articles lies in the procedure for drafting the amendments. Article 108 provides for their initial adoption by a vote of two-thirds of the members of the General Assembly. Paragraphs 1 and 2 of Article 109, on the other hand, provide for a general conference of the Members of the United Nations for the purpose of reviewing the Charter. Such a conference may be held at a date and place to be fixed by a two-thirds vote of the members of the Assembly and by a vote of any seven members of the Council. Since each Member of the United Nations has one vote in the conference, it would differ little from a meeting of the General Assembly, although the Rules of Procedure of the Assembly would not apply automatically to the conference. By Article 109 (3), the proposal to call a conference for the purpose of reviewing the Charter is to be placed on the agenda of the tenth annual session of the Assembly, if such a conference has not been held before then. The procedure for holding the conference and the requirements for the adoption and entry into force of amendments are the same as under paragraphs 1 and 2 of Article 109.

III

(*a*) *Organization and procedure*

It may be inferred from the above general review of the provisions of the Charter governing the functions and powers of the General Assembly and the Security Council that the relations between the two organs are not very simple. Consideration is given below[1] to some of the problems that have arisen in practice out of those provisions, but first it is necessary to mention certain provisions of the Charter that affect the organization and procedure of the Assembly and the Council in relation to one another.

Each organ is responsible for its own rules of procedure,[2] but some rules are set forth in the Charter itself. The Security Council is required to be so organized as to be able to function continuously.[3] It should also hold periodic meetings at which each of its members may be represented by a member of the government.[4] These provisions should give the Council an advantage over the Assembly, which only meets in regular annual sessions

[1] See pp. 85 ff.
[2] Ch. Arts. 21 and 30.
[3] Ch. Art. 28 (1).
[4] Ch. Art. 28 (2).

and in such special sessions as occasion may require.[1] In fact, Ministers, including the Foreign Ministers of the permanent members of the Security Council, regularly attend the General Assembly, but rarely appear in the Council. The provision for periodic meetings of the Council, which Ministers were expected to attend to discuss important political problems, has proved a dead-letter. The number of meetings of the Council has tended to dwindle and the advantage of permanence, which the Council was meant to enjoy, has been disappearing. Important political problems in the international field are discussed at or during sessions of the Assembly rather than in the Council. Regular annual sessions of the Assembly are long and as often as not are held in two parts. In 1951, the fifth regular session of the Assembly was prolonged until the beginning of the sixth session so that it might be able to deal with the Korean problem. An attempt to bridge the gap that might exist between regular sessions of the Assembly was made by the establishment of the Interim Committee,[2] on which all Members of the United Nations have the right to be represented. It is doubtful, however, whether there is a real need for a committee of all Members between sessions, because emergencies can be met either by extending a regular session of the Assembly or by the convocation of a special session by the Secretary-General.[3]

It may be said as a general rule that the Assembly has no power to control the Council. The Charter was meant to be based upon a separation of functions. Therefore, normally, the Council and the Assembly operate independently of one another. By Articles 10 and 11, however, the Assembly is given the power to make recommendations to the Council. By virtue of Article 10 this is a broad power because it applies to any questions or matters within the scope of the Charter. The Council is given no express power to make recommendations to the Assembly and it is not its practice to do so except, of course, in specific classes of cases in which provision is made for the Assembly to act upon the recommendation of the Council, e.g. the admission of new Members. Recommendations with respect to disputes or situations under Articles 36 and 37 are apparently intended to be made by the Council to the parties. This is certainly the case under Articles 33 and 38. Article 39, relating to threats to the peace, breaches of the peace or acts of aggression, simply empowers the Council to 'make recommendations' without specifying to whom they may be made. The Council can certainly make recommendations to all Members of the United Nations under this Article. This was done, for example, in the case of the Korean Question, when the Council recommended 'That Members of the

[1] Ch. Art. 20.

[2] See also p. 93 below.

[3] Ch. Art. 20. Special sessions of the General Assembly shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area'.[1] The language of Article 39 is wide enough to permit recommendations to the Assembly, but it has not been so applied by the Council.

Although independent of one another, the Assembly and the Council do not, and were not intended to, operate in complete isolation from one another. The fact that all members of the Council, and particularly the five permanent members, are also members of the Assembly, ensures, to some extent, a common policy and, at least, a common knowledge of political and security matters by the members of the two organs. Moreover, the Charter provides for the reference of certain matters from one organ to the other. Thus, by Article 11 (3), the Assembly may call the attention of the Council to situations which are likely to endanger international peace and security. By paragraph 2 of Article 11, the Assembly is obliged to refer to the Council any question brought before it under that paragraph 'on which action is necessary'.[2] The Council, for its part, is, at least by implication, authorized by Article 12 (1) to request the Assembly to make recommendations with regard to any dispute or situation, even if the Council is exercising its functions in respect of such dispute or situation.[3]

(*b*) *Paragraph 1 of Article 12*

The power of the Council to address such requests to the Assembly has lain dormant, but the Council has reacted to Article 12 (1) in a way which has, in effect, provided a means for transferring items to the Assembly. Article 12 (1) was designed to prevent interference by the Assembly with the Council in the exercise of its functions. It was intended to ensure that so long as a dispute or situation was being dealt with by the Council the Assembly should not make recommendations which might conflict with those made by the Council.[4] When, however, further progress has become impossible, or when a direct request by the Council to the Assembly to make recommendations has been, or has been likely to be, blocked by the

[1] Resolution adopted at the 474th meeting (27 June 1950). [2] See pp. 97–99 below.

[3] Ch. Art. 12 (1) reads as follows: 'While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.'

[4] The records of the San Francisco Conference bear testimony to the anxiety of delegations to avoid conflict between the General Assembly and the Security Council. This problem was discussed in Committee II/2. See, for example, the Summary Reports of the 6th meeting of the Committee (U.N.C.I.O., *Documents*, vol. 9, p. 38) and of the 13th meeting (ibid., pp. 86–87). At the latter meeting, when considering the question whether the Council should submit reports to the Assembly for its consideration, the Committee discussed 'whether or not an affirmative answer to this question would be consistent with its previous decisions designed to avoid any possibility of collision between the Security Council and the Assembly and any hampering of the Security Council in difficult and delicate situations'.

veto, the Council has cleared the way for the Assembly by the procedural step of removing the item from its agenda. The circumstances of removal have made it clear that the majority of members of the Council intended the item to be placed on the agenda of the Assembly, and this in fact has happened. Thus, paragraph 1 of Article 12 has not proved the obstacle in the path of the Assembly that some delegations at San Francisco feared it would be. If the sole reason for inactivity on the part of the Council is the veto, it is always possible for the majority, which in that event would consist of not less than seven members, to remove the item from the Security Council agenda and so leave the Assembly free to make recommendations on it.

This manœuvre was first used in 1946 in the Spanish case. In April of that year, Poland had asked the Security Council to direct Members of the United Nations to sever diplomatic relations with Spain. They were unable to secure adoption of the resolution by the Council and, at the request of the Polish and Soviet representatives, the Council removed the item from its agenda.[1] The General Assembly then took up the matter and adopted a resolution which recommended all Members of the United Nations to recall their Ambassadors and Ministers from Madrid.[2] The device of removing items from the list of matters of which the Security Council is seised was also used in the case of the Greek question in 1947,[3] and the Korean question in 1951.[4]

The prohibition on the General Assembly under Article 12 (1) is limited to a dispute or situation with which the Security Council is dealing. Therefore the Assembly is not prevented from making recommendations with respect to some different matter even though it may indirectly affect the dispute or situation before the Council. Thus, the Assembly was not restrained from making recommendations under the item 'The problem

[1] Resolution adopted at the 79th meeting (4 November 1946) as follows: 'The Security Council resolves that the situation in Spain is to be taken off the list of matters of which the Council is seised, and that all records and documents of the case be put at the disposal of the General Assembly. The Security Council requests the Secretary-General to notify the General Assembly of this decision.'

[2] G.A. Res. 39 (I), 12 December 1946. It may be noted that whereas the Security Council, if acting under Article 41, might have directed the severance of diplomatic relations, the Assembly resolution was limited to a recommendation, and that the recommendation did not call for the severance of diplomatic relations but merely for the recall of the senior diplomatic representatives.

[3] The Security Council had failed to find a solution of the Greek question. At its 202nd meeting on 15 September 1947, the United States Delegation submitted a draft resolution pursuant to Article 12, which would have requested the General Assembly to make recommendations on the dispute between Greece, on the one hand, and Albania, Yugoslavia, and Bulgaria, on the other. The Representative of the Soviet Union, who was also President of the Council, vetoed the resolution. He also vetoed the proposal that the question was one of procedure. Thereupon the United States introduced a new resolution in terms similar to that used in the Spanish case by which the dispute was taken off the list of matters of which the Council was seised.

[4] At the 531st meeting, 31 January 1951, the Security Council, at the request of the Representative of the United Kingdom, removed the Korean question from the list of matters of which it was seised. For further details with respect to the Korean question see below, pp. 89 ff.

of the independence of Korea', even though the Council was still seised of the item 'Complaint of aggression upon the Republic of Korea'. The Assembly was concerned with rehabilitation and the future independence and unification of Korea. The Council was concerned with putting an end to the fighting and restoring peace in Korea. The application of a similar doctrine may be seen in the Palestine case, but this interesting illustration of the relations between the Assembly and the Council is considered more fully below.[1]

Another loophole for the Assembly may be found in the fact that the prohibition in Article 12 (1) applies only to recommendations. It does not prevent either discussion or resolutions not containing recommendations. An international organ such as the Assembly can exercise considerable political influence merely by the expression of a consensus of opinion in debate, by keeping a situation under review, by establishing a committee to study and report, or by adopting a resolution taking note of certain facts. Not infrequently, it is the preamble of a resolution that is its most controversial part. It is an interesting question whether Article 12 (1) is a bar to a finding of aggression in a situation of which the Council is seised. On the assumption that Article 39 does not give the Council exclusive jurisdiction to make a finding that aggression exists, there does not seem to be anything in Article 12 (1) to prevent the Assembly from so doing.[2]

There is a further problem as to the interpretation of Article 12 (1) that deserves attention. The prohibition on the General Assembly only applies while the Security Council 'is exercising . . . the functions assigned to it'. As soon as the Council ceases to exercise its functions with respect to any dispute or situation, the Assembly is free to make recommendations. The problem is to decide in what circumstances the Council may be regarded as having ceased to exercise its functions. Can the Assembly make recommendations on a matter if the Council is still seised of it but is not actively considering the matter? The answer to the question seems to depend not only on the language of paragraph 1 of Article 12, but also on paragraph 2 of that Article. Paragraph 2 provides for notification to the Assembly by the Secretary-General, with the consent of the Council, of matters 'being dealt with by the Security Council', and for notification to the Assembly or the Members of the United Nations 'immediately the Security Council ceases to deal with such matters'. Some play might be made with the difference in wording between paragraph 1 and paragraph 2 of Article 12, but it is a reasonable assumption that the meaning of

[1] See pp. 87 ff.

[2] It would be possible in theory, though unlikely in practice, that one organ might find that aggression existed in a given situation and the other might find that it did not. On the other hand, there is a practical possibility of the General Assembly's making such a finding after the failure of the Security Council to do so. See the discussion of the Korean question below, at p. 89.

'exercising . . . functions' was not intended to be substantially different from the meaning of 'being dealt with' or 'to deal with'. Unfortunately, neither wording is clear or precise in its meaning.

Attempts might be made to show that in relation to any particular dispute or situation the Security Council is not in fact exercising its functions at the time of the relevant vote in the General Assembly. The most likely circumstance in which this contention might be put forward is that the Security Council has failed to adopt a certain resolution, or indeed any resolution, because of the veto. The mere exercise of the veto, however, does not in itself seem to be a very good ground for claiming that the Council has ceased to deal with the matter. There is no special magic about the veto. Like any negative vote, it may be cast for an infinite variety of reasons. A change of approach or of circumstances may lead to changes in the voting by delegations. Therefore it is always possible that the Council, having failed to adopt a resolution at one meeting, may do so at a later meeting.

It would be wrong to assume, merely because the Council is not actively discussing a matter at any given time, that it is not exercising its functions or that it has ceased to deal with it. For example, the matter might be in suspense pending a reference to the International Court, or while mediation is in progress. It is even possible that the Council may consider it wise not to adopt any resolution on the matter, but to remain seised of it so as to be able to resume active consideration should any incident occur requiring the attention of the Council. The Palestine question, for example, has long been on the continuing agenda of the Council. From time to time various aspects of the question have been raised in the Council and dealt with under that agenda item. At present,[1] the Council is not actively considering the Palestine question and has not done so for some considerable time. Yet it is still seised of the matter and any new incidents arising, e.g. out of the Armistice Agreements between Israel and the Arab states, might come before the Council at any time. Although, therefore, the Council is not actively considering the matter, it would not be safe to say that the Council is not exercising its functions or dealing with it. From the practical point of view, it is almost impossible to say when the Council has ceased to deal with a matter, unless the Council has expressly removed the matter from its agenda or has authorized the Secretary-General to make a notification under Article 12 (2) that it has ceased to deal with the matter. In the absence of some such clear-cut indication by the Council itself, it would not be safe to assume that it is not exercising its functions or has ceased to deal with a matter, so long as that matter remains on the list of items of which the Council is seised which is circulated to members of the Council each

[1] March 1953. For further details of the Palestine question see below, pp. 87 ff.

week in accordance with Rule 11 of the provisional Rules of Procedure of the Council.

(*c*) *Security Council Reports to the General Assembly*

The anxiety of the San Francisco Conference to avoid conflict between the General Assembly and the Security Council was expressed not only in the consideration of Article 12 (1), but also in relation to Article 15 (1). The latter provides that the Assembly shall receive and consider annual and special reports from the Council, which shall include an account of the measures decided upon or taken by the Council to maintain international peace and security.[1] It was feared that the requirement of reports to be made by the Council to the Assembly would give the latter an opportunity to debate, criticize, and possibly adopt resolutions contrary to the decisions of the Council. It is significant that the provision for reports from other organs of the United Nations, including the Economic and Social Council and the Trusteeship Council, is made in a separate paragraph of Article 15. The reports of those Councils are considered in detail in committees of the Assembly. The report of the Economic and Social Council, in particular, is taken as the basis for debate in the Assembly and the adoption of resolutions that do not necessarily approve or coincide with the recommendations contained in it.[2]

The question whether consideration of Security Council reports might result in conflict between the General Assembly and the Security Council was discussed at some length at the San Francisco Conference. Suggestions that the Council should give its reasons for arriving at its decisions were expressly negatived.[3] There was, however, considerable pressure to give the Assembly power to consider matters raised by the reports of the Council and, indeed, Article 24 (3) expressly provides that the reports are to be submitted for the consideration of the Assembly. But there was strong opposition to giving the Assembly the right to make observations or to give opinions concerning the reports of the Council, and a proposal giving the Assembly such a right was withdrawn on the basis of an express interpretation to be included in the report of Committee II/2.[4] Accordingly, in recommending what is now paragraph 1 of Article 15, Committee II/2 included in its report[5] the following interpretation:

[1] See also Ch. Art. 24 (3), which provides the corresponding obligation on the Security Council to submit reports to the General Assembly 'for its consideration'.

[2] The Economic and Social Council, as distinguished from the Security Council, is responsible to the Assembly for the exercise of its functions: see Ch. Arts. 60, 62, 63, and 66. Similarly, the Trusteeship Council is expressly placed under the authority of the General Assembly: see Ch. Art. 85.

[3] A proposal to that effect made by France, seconded by China, was rejected at the 13th meeting of Committee II/2 (U.N.C.I.O., *Documents*, vol. 9, pp. 87–88).

[4] Summary Record of 22nd meeting of Committee II/2 (ibid., pp. 184–5).

[5] U.N.C.I.O., *Documents*, vol. 9, at p. 245.

'Paragraph 8 [corresponding to Article 15] does not limit, in any way, the powers of the Assembly set forth in paragraphs 1 and 6 [corresponding to Articles 10 and 13 (1)] and consequently the General Assembly, when considering reports from the Security Council, may exercise the powers of discussion and recommendation stated in those paragraphs.'

In the absence of anything to the contrary in the Charter, that interpretation is unexceptionable. Undoubtedly, however, the intention was not that the Assembly should debate the report of the Council in detail and express its opinion on the report, but merely that the Assembly should be free to exercise its own powers with respect to a matter notwithstanding that the matter was mentioned in the report of the Security Council. That interpretation of the effect of the Charter provisions has been borne out by the practice of the Assembly. Consideration of the Security Council report by the Assembly has become a formality. Normally, it does not debate the substance of the report, which is entirely factual, but merely adopts a resolution taking note of it.

IV

The fears of conflict between the General Assembly and the Security Council have so far proved to be unfounded. This does not mean that the Assembly has refrained from entering upon the fields that were expected to be the preserve of the Council, namely, the pacific settlement of disputes and the maintenance of international peace and security. It should not, however, be concluded that such entry is a trespass: nor should it be concluded that the Assembly has tried to oust the Council. Sometimes the efforts of the two organs have been complementary. This may be illustrated by the attempts to deal with the problem of disarmament and various aspects of the Palestine question. Sometimes, as in the case of Korea, the Assembly has picked up the threads where they have been dropped by the Council. It would, however, be an error to think that the efforts of the Council have always been fruitless; it has not always been frustrated by the veto. It has, for example, contributed materially to the solution of the Iranian, Indonesian, and Palestine questions. It has also been playing a role, the importance of which cannot yet be judged, in trying to bring about a peaceful settlement of the dispute between India and Pakistan over Kashmir. How effective the Council could be in halting aggression has been shown by the action in Korea in accordance with resolutions adopted with great speed in the face of the North Korean attack in June 1950. Yet the growing realization that action by the Council might be impossible has led the Assembly to search for means—lawful means within the Charter—of strengthening international peace and security. The search has followed three courses: general exhortations in accordance with the Purposes and

Principles of the Charter, attempts to secure modification either in fact or in law of the voting procedure in the Council, and the development of machinery outside the Council. There have been two main steps in this development; namely, the establishment of the Interim Committee and the adoption of the 'Uniting for Peace' Resolution. Meanwhile, there has been a struggle between the Council and the Assembly in connexion with the exercise of the joint powers to admit new Members and to appoint the Secretary-General.

These are the most important elements in the development of the relations we are considering. Accordingly, it will be the purpose of the remainder of this article to review briefly the pertinent aspects of:

(*a*) The problem of disarmament;
(*b*) The Palestine question;
(*c*) The Korean question;
(*d*) The establishment of the Interim Committee;
(*e*) The 'Uniting for Peace' Resolution;
(*f*) Voting procedure in the Security Council;
(*g*) Joint powers: (i) Admission of new Members, and (ii) Appointment of the Secretary-General.

(*a*) *The problem of disarmament*

Fourteen days after the opening of its first Session, the General Assembly adopted a Resolution[1] establishing a Commission to deal with the problems raised by the discovery of atomic energy. The terms of reference of the Commission extended beyond the scope of disarmament, but the core was the limitation of the use of atomic energy to peaceful purposes and the elimination from national armaments of atomic weapons and all other weapons of mass destruction. The Assembly was careful to pay full respect to the prerogatives of the Security Council. The Commission was to submit its reports and recommendations to the Council, to be accountable to the Council 'in matters affecting security', to have its rules of procedure approved by the Council, and was enjoined not to 'infringe upon the responsibilities of any organ of the United Nations'. The primary responsibility of the Security Council for the maintenance of international peace and security was expressly recognized. Furthermore, the Commission, although established by the Assembly, was to be composed of representatives of the states members of the Security Council, and of Canada when not a member of the Council.

From a procedural standpoint, the Security Council co-operated well. It approved the rules of procedure of the Atomic Energy Commission[2]

[1] 17th plenary meeting, 24 January 1946.
[2] Decision adopted at the 50th meeting, 10 July 1946.

and requested the Commission to continue its work.[1] In June 1948, however, the Council, being unable to reach substantial agreement on the reports of the Commission, directed the Secretary-General to transmit them to the Assembly 'as a matter of special concern'.[2]

Meanwhile, in December 1946, the Assembly adopted a Resolution[3] on the principles governing the general regulation and reduction of armaments. That Resolution contained a series of recommendations to the Security Council which, while recognizing its primary responsibility for the maintenance of international peace and security, urged it to take steps to realize the aspirations of the United Nations in the control of atomic energy, the regulation and reduction of armaments and armed forces, and the acceleration of the placing at its disposal of the armed forces mentioned in Article 43 of the Charter. The Council accepted that Resolution[4] and resolved to work out practical measures for giving effect to it.[5] For that purpose, the Council established the Commission for Conventional Armaments.[5] However, apart from the approval of the Plan of Work of that Commission, the Council failed to make further progress in the field of disarmament. It had to content itself with being a post office between the two Commissions and the Assembly.[6] This state of affairs continued, in spite of the urgent prodding of the Assembly, until January 1952, when the Council dissolved the Commission for Conventional Armaments.[7] This was done to give effect to a recommendation of the Assembly in a Resolution of 11 January 1952[8] dissolving the Atomic Energy Commission and establishing the Disarmament Commission. The new Commission was given functions broadly corresponding to the functions of the two Commissions which it replaced. There is, however, a noticeable difference of tone in the attitude towards the Council between the Assembly Resolution of January 1946 and that of January 1952. The latter does not mention the primary responsibility of the Council, but does stress the Purposes and Principles of the Charter. The technical position of the Council is acknowledged by the establishment of the Commission 'under the Security Council', but the new Commission is the creature of the Assembly and its rules of procedure are prescribed by the Assembly without Council approval. The Commission is required to report both to the Council and to the Assembly, or, if the latter is not in session, to the Members of the United Nations. Although

[1] Resolution adopted at the 117th meeting, 10 March 1947.
[2] Resolution adopted at the 325th meeting, 22 June 1948.
[3] G.A. Res. 41 (I).
[4] Decision adopted at the 90th meeting, 9 January 1947.
[5] Resolution adopted at the 105th meeting, 13 February 1947.
[6] See Resolutions adopted by the Council at the 408th meeting (10 February 1949), 447th meeting (16 September 1949), 450th meeting (11 October 1949), 452nd meeting (18 October 1949), and 462nd meeting (17 January 1950).
[7] Resolution adopted at the 571st meeting, 30 January 1952.
[8] G.A. Res. 502 (VI).

the Resolution of January 1952 shows a considerable shift in the centre of gravity from the Council to the Assembly, there is no doubt that it was within the competence of the latter. This was, in effect, acknowledged by the Council when it dissolved the Commission for Conventional Armaments in view of the Assembly recommendation to that effect in paragraph 2 of the Resolution.

(*b*) *The Palestine question*

It is not proposed to trace the whole history of the complex Palestine question, but to use it to illustrate how the Assembly and the Council can deal with different aspects of the same matter with at least some measure of co-operation. The problem of the future government of Palestine first came before a Special Session of the Assembly summoned at the request of the United Kingdom, the Mandatory Power for Palestine, in 1947. At that Session the Assembly established a Special Committee[1] which submitted several recommendations and a plan of partition to the Second Regular Session of the Assembly.[2] In November 1947, acting apparently under Article 14 of the Charter,[3] the Assembly recommended the United Kingdom and all other Members of the United Nations to adopt and implement the Plan of Partition. It also requested[4] the Security Council to take the necessary measures for its implementation and, if circumstances should require, to take measures, under Articles 39 and 41 of the Charter, to empower the Commission created by the Resolution[5] to exercise its functions. The Commission was to act 'in conformity with the recommendations of the General Assembly, under the guidance of the Security Council'.

The Council was reluctant to implement the Assembly Resolution, but, on 1 April 1948, in view of the increasing disorder in Palestine, it called on Arab and Jewish groups to cease acts of violence.[6] At the same meeting, the Council returned the question of the future government of Palestine to the Assembly by requesting the Secretary-General to convoke a special session.[7] Accordingly, the Second Special Session of the Assembly met on 16 April 1948. On 17 April, the Council called for the cessation of all military activities and violence in Palestine,[8] and on 23 April, established

[1] G.A. Res. 106 (S–1).

[2] Report of the Special Committee (document A/364): see *Official Records of the Second Session of the General Assembly*, Supplement No. 11, vols. i-iv.

[3] G.A. Res. 181 (II). See paragraph 3 of the Preamble.

[4] Expressions such as 'requested' and 'calls upon' addressed by the General Assembly to the Security Council or to Members of the United Nations cannot legally amount to more than recommendations. The phrase 'calls upon' is ambiguous, but when used by the Security Council acting under Chapter VII of the Charter, it may have the effect of imposing obligations on the states to which it is addressed.

[5] See Part I, Section B, of the 'Plan of Partition with Economic Union' annexed to G.A. Res. 181 (II).

[6] Resolution adopted at the 277th meeting.

[7] See Ch. Art. 20.

[8] Resolution adopted at the 283rd meeting.

the Truce Commission for Palestine, to supervise the implementation of the Resolution of 17 April.[1] Fighting continued, and on 22 May the Council called for a cease-fire within thirty-six hours.[2] A further call by the Council for a cease-fire on 29 May was reinforced by a threat of action under Chapter VII of the Charter.[3] Ultimately, on 15 July, the Council, acting under Articles 39 and 40, ordered a cease-fire.[4] The Council took a series of steps to protect Jerusalem, to ensure observance of the truce, and to bring about armistice agreements between Israel and the Arab States.[5] After the Armistice Agreements had been signed, they were reinforced by a Council Resolution of 11 August 1949.[6]

Meanwhile, on 14 May 1948, during its Second Special Session, the General Assembly had provided for the appointment of a United Nations Mediator in Palestine,[7] who was instructed to co-operate with the Truce Commission for Palestine appointed by the Security Council and to report to the Council as well as to the Secretary-General. The Council placed considerable reliance on the services of the Mediator and Acting Mediator.[8] During its Special Session the Assembly was also concerned with the protection of Jerusalem.[9] Since the entry into force of the Armistice Agreements, the Security Council has been responsible for their supervision through the United Nations Chief of Staff of the Truce Supervision Organization, who acts as Chairman of the respective Mixed Armistice Commissions. Most of the incidents alleged to be breaches of the Armistice Agreements have been settled without reference to the Council, but some have required its attention.

The final settlement of the Palestine question, the future of Jerusalem, and the problem of Palestine refugees have been repeatedly before the Assembly since its Special Session in May 1948. The Assembly has several times looked to the Council for help and co-operation as, for example, in the demilitarization of Jerusalem.[10] Sometimes the Assembly has come close to making recommendations on the question before the Council, contrary to Article 12 (1) of the Charter, but it may be said that the Council has been concerned with the termination of hostilities whereas the Assembly has been concerned with bringing about a final settlement of outstanding

[1] Resolution adopted at the 287th meeting. [2] Resolution adopted at the 302nd meeting.
[3] Resolution adopted at the 310th meeting.
[4] Resolution adopted at the 338th meeting.
[5] There were four Armistice Agreements, concluded as follows: (i) Israel and Egypt, signed on 24 February 1949 (S/1264); (ii) Israel and Lebanon, signed on 23 March 1949 (S/1296); (iii) Israel and Transjordan, signed on 3 April 1949 (S/1302); (iv) Israel and Syria, signed on 20 July 1949 (S/1353) (references are to Security Council documents).
[6] Resolution adopted at the 437th meeting. [7] G.A. Res. 186 (S–2), 14 May 1948.
[8] The Mediator, Count Folke Bernadotte, was assassinated by terrorists in Jerusalem and Dr. Ralph Bunche was designated as Acting Mediator by the Security Council on 18 September 1948.
[9] See G.A. Res. 185 (S–2), 26 April 1948, and G.A. Res. 187 (S–2), 6 May 1948.
[10] See, for example, paragraph 8 of G.A. Res. 194 (III), 11 December 1948.

differences and the ultimate establishment of normal relations between Israel and the Arab states. There has been no conflict between the two organs such as Article 12 (1) was designed to avoid. On the contrary, the history of the Palestine question is probably the best example of the operation of the Charter through the activities of the General Assembly and the Security Council in their respective spheres.

(*c*) *The Korean question*

Like the Palestine question, the question of Korea has been dealt with by both the General Assembly and the Security Council. The problem of the independence of Korea first came before the Assembly at its Second Regular Session in 1947. The Assembly sought the establishment of an independent Korea through the election of a National Assembly under the observance of the United Nations Temporary Commission for Korea and by the withdrawal of occupying forces.[1] By the following year, elections had been held in the southern part of Korea but not in North Korea, and the Assembly was forced to acknowledge that its purpose had not been fulfilled. Nevertheless, it recognized the elected Government of the Republic of Korea and determined to pursue its policy of the unification of Korea with the aid of a new Commission, appointed to take the place of the Temporary Commission.[2] At its Fourth Session, the Assembly again confirmed its intention to bring about the unification of Korea.[3] It was also concerned for the security of the Republic of Korea and that there was a risk of open military conflict. Accordingly, the United Nations Commission on Korea was continued and was instructed to observe any developments which might lead to military conflict. It is interesting to note that in taking the situation in Korea under observation, the Assembly was performing one of the functions that the Security Council might have been expected to perform as the guardian of the peace. Nevertheless, there seems to be no reason to think that the Assembly was acting outside its powers, which include the power to establish such subsidiary organs as it deems necessary for the execution of its functions.[4] Neither the Commission nor its observers could, of course, under the authority of the Assembly, enter upon the territory of a state without the consent of its government, but the Assembly called upon Member states, the Government of the Republic of Korea, and all Koreans to afford every assistance and facility to the Commission in the fulfilment of its responsibilities.

In June 1950, when fighting broke out in Korea, the Security Council called for an immediate cessation of hostilities and called upon the authori-

[1] G.A. Res. 112 (II), 14 November 1947.
[2] G.A. Res. 195 (III) 12 December 1948.
[3] G.A. Res. 293 (IV) 21 October 1949.
[4] Ch. Art. 22.

ties in North Korea to withdraw their armed forces to the 38th parallel.[1] The Council also requested the United Nations Commission on Korea to make recommendations and to keep the Security Council informed on the execution of its resolutions. The Commission, already established by the Assembly, was able to report promptly. On 27 June 1950, the Council, noting from the report of the Commission that the authorities in North Korea had neither ceased hostilities nor withdrawn their armed forces to the 38th parallel, recommended Members of the United Nations to help the Republic of Korea to repel the armed attack.[2] On 7 July 1950, the Council recommended that the forces and assistance provided by Members of the United Nations be made available to a Unified Command under the United States, and authorized the Unified Command to use the United Nations flag in the course of operations against North Korean forces.[3] In its Resolutions of 27 June and 7 July, the Security Council made a determination that there was a breach of the peace, and made recommendations to Members of the United Nations. In so doing it was clearly acting under Article 39 of the Charter, although no specific Article was mentioned in either Resolution. One other step in the Council is worth noting. On 31 July 1950, the Council requested the Unified Command to determine and report to the Council on the requirements for the relief and support of the civilian population of Korea and for establishing in the field the procedures for providing such relief and support.[4] In so doing the Security Council was still acting under the item 'Complaint of aggression upon the Republic of Korea', and the request was undoubtedly within its competence. Nevertheless, it was a step which in substance might have been expected to be taken by the Assembly, the Economic and Social Council, and the Specialized Agencies.[5]

The 'problem of the independence of Korea' again came before the General Assembly, at its Fifth Session. On 7 October 1950, the Assembly adopted a Resolution once more recalling its objective of establishing a unified Korea, but was aware that the armed attack from North Korea had prevented the accomplishment of that objective.[6] In the main, the recommendations of the Assembly were directed towards unification and stability

[1] Resolution adopted at the 473rd meeting (25 June 1950).
[2] Resolution adopted at the 474th meeting.
[3] Resolution adopted at the 476th meeting.
[4] Resolution adopted at the 479th meeting.
[5] This was in effect recognized by the Council, which requested 'The Secretary-General, the Economic and Social Council, in accordance with Article 65 of the Charter, other appropriate United Nations principal and subsidiary organ, the Specialized Agencies in accordance with the terms of their respective agreements with United Nations, and appropriate non-governmental organizations, to provide such assistance as the Unified Command may request for the relief and support of the civilian population of Korea, and as appropriate in connection with the responsibilities being carried out by the Unified Command on behalf of the Security Council.'
[6] G.A. Res. 376 (V).

and the holding of elections in Korea. The Assembly created a new Commission for the unification and rehabilitation of Korea to take the place of the then existing United Nations Commission. The Assembly Resolution included a recommendation that representative bodies of the population of Korea, South and North, be invited to co-operate with the organs of the United Nations in the restoration of peace,[1] in the holding of elections, and in the establishment of a unified government.

On 14 December 1950, the Assembly adopted a Resolution[2] establishing a group of three persons to determine the basis on which a satisfactory cease-fire in Korea could be arranged and to make recommendations to the General Assembly as soon as possible. This Resolution, like that of 7 October 1950, was adopted after the Soviet Union had returned to the Security Council and it had become clear that, because of the veto, the Council was unable at that time to exercise its functions effectively so as to deal with the situation in Korea.[3] The Assembly was becoming restive in view of the impotence of the Council, and had already adopted the 'Uniting for Peace' Resolution on 3 November 1950.[4] On 31 January 1951, however, in order to avoid doubts as to the legality of any recommendation that might be made by the Assembly, the item 'Complaint of aggression upon the Republic of Korea' was removed from the list of matters of which the Council was seised.[5] The way was thus cleared for the adoption by the

[1] It is questionable whether, having regard to the fact that the Security Council was then dealing with the situation resulting from the armed attack in Korea, the Assembly should have included the phrase 'the restoration of peace' in its recommendation. If this had been the essence of the Assembly Resolution it might have been regarded as infringing Article 12 (1) of the Charter. The point is doubtful, but it may be argued that this reference to the restoration of peace was only subsidiary or incidental to the problem of the independence of Korea—its unification and rehabilitation—and should not be read as a recommendation with regard to the situation actually before the Council.

[2] G.A. Res. 384 (V).

[3] The resolution of 14 December was adopted under the item 'Intervention of the Central People's Government of the People's Republic of China in Korea'. But it is doubtful whether the fact that the Resolution was adopted under that item would, having regard to Article 12 (1) of the Charter, have justified a recommendation, e.g. for a cease-fire. The Assembly avoided any possibility of infringing that Article by refraining from making a recommendation. It merely established a group to seek a basis for a cease-fire and to make recommendations to the Assembly.

[4] G.A. Res. 377 A (V). See also pp. 94 ff., below.

[5] Sir Gladwyn Jebb, speaking as the United Kingdom Representative, explained the position as follows:

> 'As the members of the Security Council no doubt recall, the Chinese intervention in Korea was discussed by us at a number of meetings during November, and a draft resolution submitted jointly by six members of the Council was finally put to the vote on 30 November 1950 (530th meeting). Although the resolution received nine affirmative votes, it was not adopted owing to the negative vote of the representative of the Soviet Union. It might therefore be argued that since that date the Council has not, in effect, been exercising its functions in respect of this question within the meaning of Article 12 of the Charter. Nevertheless, the discussion which has since taken place in the General Assembly has ranged over a considerable field, and my own delegation, at any rate, feels that if the General Assembly were to adopt a resolution containing recommendations to Members and dealing with the question of Chinese intervention, or with

Assembly on 1 February 1951 of a Resolution[1] which noted the failure of the Council, because of lack of unanimity of the permanent members, to exercise its primary responsibility for the maintenance of international peace and security in Korea, found that the Central People's Government of the People's Republic of China had engaged in aggression in Korea and, *inter alia*, called upon all states and authorities to continue to render every assistance to the United Nations action in Korea. The Resolution also established the Additional Measures Committee to consider additional measures to be employed to meet the aggression in Korea. On 18 May 1951, having considered the report of the Additional Measures Committee, the Assembly adopted a Resolution[2] recommending 'every state' to apply an embargo on the shipment to the Central People's Government and the North Korean authorities of certain strategic materials.[3]

The General Assembly has continued its efforts to bring about a cessation of hostilities in Korea. At its Seventh Session it adopted a Resolution making specific recommendations designed to secure an armistice.[4] The Assembly has thus been trying to achieve, with respect to the Korean question, what the Security Council did achieve with respect to the Palestine question. The failure of the Assembly so far to bring about an armistice does not alter the fact, which is most interesting from the legal point of view, that the Assembly is exercising functions which were intended by the founders of the Charter to be the primary responsibility of the Security Council.

the broader question of the complaint of aggression against the Republic of Korea, both questions having now become indistinguishable in practice, objections might then be raised that this would be an infringement of Article 12 of the Charter.

'It was in order to remove any technical doubts of this nature which might arise that I asked the President to convene a meeting for the purely formal purpose of getting the item entitled "Complaint of aggression upon the Republic of Korea" taken off the agenda of the Security Council'. (Security Council, *Official Records*, Sixth Year, 531st meeting, p. 8.)

[1] G.A. Res. 498 (V).

[2] G.A. Res. 500 (V).

[3] Both the Resolutions of 1 February and 18 May 1951 addressed recommendations not only to Members of the United Nations, but to all states. The Assembly did not indicate whether it was acting under Article 10 or Article 11 (2), and the reference to all states creates a doubt in this connexion. By Article 10 the Assembly is authorized to make recommendations to the Members of the United Nations or to the Security Council. It has not been expressly given power to make recommendations to states not Members of the United Nations. The Assembly, however, is not prohibited by the terms of the Charter from making recommendations to non-Member states, and it may well be argued that the language of Article 10 should not be read as implying such a limitation. Under paragraph 2 of Article 11, the Assembly may make recommendations to the state or states concerned. It might be said that where there is an act of aggression all states, whether Members of the United Nations or not, are concerned, but that would not be a very convincing argument. Accordingly, it appears that the words used might, in any given case, apply to some but not all Members and to some but not all non-Member States. Therefore the words seem to impose a limit on the states to which the Assembly may address recommendations under Article 11 (2), and the safer conclusion is that the Assembly, in adopting the Resolutions of 1 February and 18 May 1951, was acting under Article 10 rather than Article 11.

[4] G.A. Res. 610 (VII), 3 December 1952.

(*d*) *The Interim Committee*

In the case of Korea, the Security Council having failed to exercise its primary responsibility for the maintenance of international peace and security, the General Assembly exercised what may be regarded as its reserve powers implicit in the Charter. It was by no means the first occasion on which the Assembly had adopted resolutions touching the maintenance of peace and security. From the beginning many, if not the majority, of the Members of the United Nations realized that there was a serious risk that the Council would be unable, because of the veto, to fulfil its primary responsibility. Accordingly, they sought means to enable the Assembly, within the powers granted to it by the Charter, to do what it could to maintain the peace. It was thought, however, that unless organized so as to be able, in effect, to function continuously like the Council, the Assembly would not be ready to meet an emergency occurring between regular sessions. For this reason, the Assembly established the Interim Committee at its Second Session in 1947.[1]

The Interim Committee was established as a subsidiary organ of the Assembly, under Article 22 of the Charter. All members of the Assembly were to have the right to be represented on it. It was originally established for the period between the Second and Third Regular Sessions of the Assembly. It was re-established again for the period between the Third and Fourth Regular Sessions,[2] and at the Fourth Session of the Assembly was re-established on a continuing basis to meet when the Assembly is not actually in regular session.[3]

Although a number of states strongly challenged the right of the Assembly to establish the Interim Committee, and have refused to participate in its work on the ground that it is an unconstitutional body, there can be no serious question that its establishment was within the powers of the Assembly. The Interim Committee was established to assist the Assembly in fulfilling its responsibility in relation to the maintenance of peace and security, but the powers of the Committee were limited to consideration and report, to advising the Secretary-General on the summoning of special sessions of the Assembly, and to conducting investigations and appointing commissions of inquiry within the scope of its duties. The Resolution provided that an investigation or inquiry elsewhere than at the headquarters of the United Nations should not be conducted without the consent of the state or states in whose territory it was to take place. The Interim Committee was enjoined to take into account the responsibilities of the Security Council under the Charter, and not to consider any matter of which the

[1] G.A. Res. 111 (II), 13 November 1947.
[2] G.A. Res. 196 (III), 3 December 1948.
[3] G.A. Res. 295 (IV), 21 November 1949.

Security Council was seised.[1] Accordingly, the provisions of Article 12 (1) of the Charter, which are designed to prevent conflict between the Assembly and the Council, were made applicable to the Interim Committee. The Interim Committee was certainly not intended to usurp any of the powers or functions of the Council. In fact, owing to the refusal of certain states to participate, it has never been the representative and useful organ it was designed to be.

(*e*) *Uniting for peace*

The effectiveness of armed resistance to the attack in Korea under recommendations of the Security Council, and the frustration resulting from the subsequent inability of the Council to deal with the situation, led the General Assembly to seek further ways of organizing itself for the fulfilment of its secondary responsibility for the maintenance of international peace and security. This was done by the 'Uniting for Peace' Resolution adopted at its Fifth Regular Session. That Resolution undoubtedly marked a turning point in the relations between the Assembly and the Council, but it is submitted that its provisions can be fully defended as being in accord with the Charter.

There were three resolutions of the Assembly adopted under the item 'Uniting for Peace'.[2] The first of those, Resolution A, is the one which is here referred to as the 'Uniting for Peace' Resolution.[3]

The preamble to the Resolution once more reaffirmed the importance of the exercise by the Security Council of its primary responsibility for the maintenance of peace. It also stated that the Assembly was conscious that failure of the Council to discharge its responsibilities did not relieve Member states of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security. The operative part of the Resolution consisted of five sections. Section A was designed to enable the Assembly to consider immediately any threat to the peace, breach of the peace or act of aggression, if the Security Council, because of lack of unanimity of the permanent members, should fail to exercise its primary responsibility. Such consideration was to be with a view 'to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or an act of aggression the use of armed force when necessary'. Section A also provided for

[1] The relevant paragraph was amended upon the re-establishment of the Interim Committee by G.A. Res. 196 (III) to read: 'The Interim Committee shall not consider any matter of which the Security Council is seised and which the latter has not submitted to the General Assembly.'

[2] G.A. Res. 377 (V), 3 November 1950.

[3] Resolutions B and C, adopted under the same item, contain recommendations to the Security Council and to its permanent members respectively, with regard to the implementation of the security provisions of the Charter.

the amendment of the Rules of Procedure of the General Assembly so as to permit an emergency special session of the Assembly to be called within twenty-four hours upon request by 'the Security Council on the vote of any seven members' or by a majority of the Members of the United Nations.

Section B established a Peace Observation Commission, which should be available to the General Assembly or the Interim Committee or the Security Council, to 'observe and report on the situation in any area where there exists international tension the continuance of which is likely to endanger the maintenance of international peace and security'. The terms of the Resolution appear to exclude the Peace Observation Commission from being used by the Assembly or the Interim Committee if the Security Council is exercising its functions with respect to the matter in question. On this point the Assembly has gone further than it need have done in recognizing the primary responsibility of the Security Council.[1] No particular constitutional difficulty arose out of the creation of this Commission.

By Section C of the resolution, Members of the United Nations were invited to survey their resources in order to determine the nature and scope of the assistance they might be in a position to render in support of any recommendations of the Security Council or the General Assembly for the restoration of peace and security. It also recommended Members of the United Nations to maintain within their national armed forces elements that could promptly be made available, for service as a United Nations unit or units, upon recommendation of the Council or the Assembly. This provision is supplementary to the provision in Section A with regard to recommendations by the Assembly to Members for collective measures including the use of armed force. The legality of such recommendations is discussed below,[2] but it is worth noting here that Section C of the Resolution placed recommendations by the Council and the Assembly on an equal footing, and made no mention of decisions by the Council to take enforcement action. This is logical because the whole of the 'Uniting for Peace' Resolution is based upon the assumption of the inability of the Security Council to take measures or to bring about the negotiation of special agreements under Article 43 by which armed forces would be made available to the Council to enable such measures to be taken. Section C is intended to provide a substitute for the armed forces which the Charter contemplated would be made available in accordance with special agreements made under Article 43. There is, of course, the important difference that the provision of armed forces in accordance with an Assembly recommendation would be entirely voluntary, whereas, once the special agreements had been made,

[1] Observation by the General Assembly or by a commission established by it does not seem to fall within the prohibition on the Assembly provided by Article 12 (1). See above, pp. 79 ff.

[2] See below, pp. 96 ff.

the provision of forces in accordance with a decision of the Council would be obligatory.

Section D of the resolution established the Collective Measures Committee, which was to report to the Security Council and the General Assembly 'on methods, including those in Section C of the present resolution, which might be used to maintain and strengthen international peace and security in accordance with the purposes and principles of the Charter, taking account of collective self-defence and regional arrangements (Articles 51 and 52 of the Charter)'. Section E contains a general exhortation which has no special bearing on the problems considered in this article.

During the debates in the General Assembly, strong protests were made against certain provisions of the 'Uniting for Peace' Resolution, broadly on the ground that it sought to substitute the Assembly for the Council as the authority responsible for the maintenance of international peace and security and that in by-passing the Council it was contrary to the United Nations Charter. It may be admitted at once that the Resolution envisages steps being taken on the initiative of the Assembly that may not have been contemplated by those who drafted the Charter and which some of the founders of the United Nations thought would be taken only by the Security Council under Chapter VII of the Charter. It does not follow, however, that the Resolution exceeded the powers actually granted to the Assembly. As we have already seen, even at the San Francisco Conference there was a difference of view[1] between those delegations which sought to extend the functions of the Assembly as widely as possible, and those delegations which looked to the Council as the heart of the Organization and wished to prevent the Assembly from interfering with action by the Council. The Council was only given primary responsibility. The use of the word 'primary' implies that some other organ of the United Nations has a secondary responsibility. The only organ that can have such a secondary responsibility is the Assembly, and this may be regarded as being conferred on it by the provisions of Article 10 which place the whole scope of the Charter within its competence.[2] The limitations of Article 10 are not on the field of competence of the General Assembly but on the powers that it may exercise within that field. The Assembly is limited to discussion and recommendation, and is prohibited from making recommendations with regard to any dispute or situation in respect of which the Council is exercising its functions. There is, however, no limitation on the kind of recommendation that the Assembly is entitled to make. Accordingly, if one looks only to Article 10 the Assembly appears

[1] See pp. 65–66 above.

[2] Article 10 may be reinforced by Articles 11 and 14 of the Charter, but it is submitted that in almost all cases it will be sufficient to rely on Article 10.

to have the right to recommend to Members of the United Nations that they take any measures, including the use of armed force, which it was contemplated the Security Council might decide to employ under Articles 41 or 42 of the Charter.

It may be argued, however, that power to deal with questions relating to the maintenance of international peace and security was conferred on the Assembly by paragraph 2 of Article 11, not by Article 10. Since that paragraph confers a specific power, the general powers under Article 10 must, it may be said, be read subject to the limitations placed upon the exercise of those specific powers.[1] In other words, the Assembly cannot make recommendations on questions relating to the maintenance of international peace and security, except under that paragraph and subject to the limitations contained in it. It appears, however, that this is not so, in view of the express provision in paragraph 4 of Article 11 that the powers of the General Assembly, set forth in that Article, shall not limit the general scope of Article 10.[2]

The provisions of paragraph 2 of Article 11 are, of course, subject to the limitation contained in Article 12, but the significant limitation for the present purpose is the one contained in the last sentence of paragraph 2, which reads: 'Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.' Assuming, for the sake of argument, that a recommendation for the use of armed force would have to be made under Article 11 (2), two questions arise on the interpretation of the last sentence of that paragraph. First, what is meant by 'action'? Secondly, what is meant by 'shall be referred to the Security Council'?

Various interpretations of the word 'action' are possible. It could mean any positive action whatsoever, such as, for example, delivery of notes of protest. It could mean any measures of the kinds contemplated in Articles 40, 41, and 42 of the Charter, including, that is, both provisional and enforcement measures. It could mean measures of the kind which might be taken by the Security Council under Articles 41 and 42. Finally, it could mean action by the Security Council, that is to say, the distinctive characteristic of 'action' would be that it was based on a decision of the Security

[1] Thus Mr. Vyshinsky (U.S.S.R.) argued as follows: 'If Article 10 of the Charter were considered to the exclusion of all other articles, it might perhaps be thought that the power of recommendation of the General Assembly was unlimited. But there was also Article 11 which enumerated a category of special questions concerning which the Assembly could make recommendations. That Article specified that if such a question required action it should be transmitted to the Security Council and that, in such a case, the Assembly had no right to make recommendations. The last sentence of paragraph 2 of Article 11 thus appeared as a limitation of Article 10, and it could not be said that there was a contradiction between Articles 10 and 11.' (*Official Records of the General Assembly*, Fifth Session, First Committee, 364th meeting, 16 October 1950, p. 133.)

[2] But see Kelsen, op. cit., pp. 965 ff.

Council under Chapter VII of the Charter. In other words, it means coercive action taken by the Security Council. The word 'action' is used in different senses in the United Nations Charter, and it is impossible to say *a priori* which is the right interpretation.[1] Nevertheless, it is possible to give it the meaning last mentioned above, and there are arguments even on the text of the charter for adopting that interpretation.

As is so often the case, little assistance is to be gained from reference to the records of the San Francisco Conference. It is interesting to note, however, that in a draft submitted by the United Kingdom Delegation to Sub-committee B of Committee II/2,[2] the paragraph corresponding to the sentence under consideration used the words 'any matter on which action (by the Security Council) is necessary'. The draft was taken as a basis for discussion in the Sub-committee, but at a subsequent meeting[3] was replaced by another draft. In the latter draft, which eventually found its way into the report of Sub-committee B,[4] the words in parentheses did not appear, but there is no indication that the discarding of the United Kingdom draft had anything to do with the omission of the phrase 'by the Security Council'. It could be inferred from this history that the phrase was omitted as being superfluous, because it was obvious that 'action' meant 'action by the Security Council'. Equally, of course, it could be argued that the omission was deliberate and that the correct inference is that 'action' means any kind of action. The latter approach, however, would re-introduce the kind of ambiguity indicated above. It seems preferable therefore to take the former inference as correct and to conclude that 'action', as used in paragraph 2 of Article 11, means 'action by the Security Council'. This conclusion would be reasonable because there would be no need to refer the question to the Security Council unless action by that body was required. If the situation could be met by voluntary action on the part of Members inspired by a recommendation of the General Assembly, there would be no need for a reference to the Council. It is open to doubt whether such an interpretation was in the minds of those who drafted the Charter, but it is equally doubtful whether they had any clear and common intention at all. Therefore, it is legitimate to accept an interpretation which does not do violence to the language, and which enables effect to be given to the Purposes and Principles of the Charter.

If 'action is necessary', the second question arises as to the significance of 'reference' to the Security Council. It can be argued that this means that the whole question must be finally and irrevocably transferred to the Council. Such an interpretation, however, would scarcely accord with the

[1] Cf. Kelsen, op. cit., pp. 962 ff., and Beckett, *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations* (1950) (under index references to 'Enforcement action').

[2] U.N.C.I.O., *Documents*, vol. 9, pp. 379, 384–5.

[3] Ibid., p. 393.

[4] Ibid., pp. 407–8.

provisions of Article 12 (1). The Council, for example, might conclude that action by it was not required and that a recommendation by the Assembly would be sufficient, and it might address a request to the Assembly under Article 12 (1) to make recommendations with regard to the question. If the Council made such a request, it would be futile to say that the Assembly was debarred from making a recommendation merely because it had previously considered 'action' to be necessary and had referred the question to the Council. It seems, on balance, to be the better view that reference to the Council is not final and irrevocable. If so, the question could again be taken under consideration by the Assembly and recommendations made on it if the Security Council removed the question from its agenda. Otherwise, an endless chain of references between the Assembly and the Council might ensue. It would be more rational to assume that, if the Assembly has referred the question to the Council once, it has satisfied the requirement of the last sentence of Article 11 (2). On this view, if the Council failed to take the question on its agenda, or removed the question from its agenda, it would be open to the Assembly to make recommendations even under Article 11 (2) without further reference to the Council. Moreover, if the view taken above of the meaning of 'action' is correct, the requirement of reference to the Security Council would not arise so long as the General Assembly considered that the situation could be met by its own recommendations.

During the debates at the Fifth Session of the Assembly, opposition to the establishment of the Collective Measures Committee[1] was largely based on the argument that, by the 'Uniting for Peace' Resolution, the Assembly was trying to usurp the powers of the Council. It was said that the armed forces supplied to the United Nations were, by virtue of Article 43, to be available exclusively to the Security Council, and that by Article 46 it is the function of the Council, acting through the Military Staff Committee, to draw up plans to meet aggression. Up to a point this is true, and, no doubt, is what was contemplated by those who drafted the Charter. The fact is that the whole of that part of the Charter relating to the use of armed force by the Security Council has, so far, proved abortive because of failure of agreement in the Military Staff Committee and in the Council. It does not follow automatically that the Assembly must have the power to make plans which the Council has failed to make, or to establish a committee for that purpose. It does, however, lead naturally to an examination of the Charter to see what the Assembly can and cannot do in this respect. It is clear that the Assembly cannot decide

[1] See the speech by Mr. Vyshinsky: *Official Records of the General Assembly*, Fifth Session, First Committee, 366th meeting, 17 October 1950, pp. 143–4. See also the speech by Mr. Wierblowski (Poland): ibid., pp. 144–5.

to use force under its own direction. Consequently, the Collective Measures Committee cannot draw up plans for the use of armed forces to be placed at the disposal of the Assembly. Nevertheless, there is nothing in the Charter to prevent the Committee from considering what Members of the United Nations might do collectively in order to maintain international peace and security in accordance with recommendations made by the Assembly. That is all that the Collective Measures Committee is called upon to do. It is not, therefore, usurping the powers of the Council.[1] It is carrying out a study which is quite different from the plans that should have been produced by the Council, with the assistance of the Military Staff Committee.

There is a further point in the 'Uniting for Peace' Resolution that deserves mention. It is the provision, made in Section A and the Annex amending the Rules of Procedure of the General Assembly, that an emergency special session shall be convened on a request 'from the Security Council on the vote of any seven members thereof'. The difficulty arises because Article 20 of the Charter expressly provides that special sessions shall be convoked at the request of the Security Council or of a majority of the Members of the United Nations. A decision to convoke a special session must be taken by the Security Council in accordance with its own Rules of Procedure, and it is not for the Assembly to prescribe for the Council the circumstances in which the vote of any seven members is sufficient. On the other hand, a request for the convocation of a special session is probably a procedural matter[2] on which a resolution may be adopted by the vote of any seven members of the Council. The problem may also be looked at from another point of view. Although Article 20 lays down the circumstances in which a special session must be convoked, it does not necessarily prevent the Assembly from providing some other procedure. It might, for example, decide to meet in special session at the request of the President of the last regular session, or at the request of the five permanent members of the Security Council. There does not, therefore, seem to be any reason why it should not decide to meet at a request emanating from the Security Council on the vote of any seven members thereof. This does not mean that the Assembly is dictating to the Council as to how it must arrive at its decisions. It merely means that, if any seven members of the Council vote in favour of the special session, it must be convoked by the Secretary-General.

(*f*) *Voting procedure in the Security Council*

From the outset of the life of the United Nations Organization the veto

[1] Moreover, the interests of the Security Council were not entirely ignored by the Resolution, which required the Committee to report to the Council as well as to the Assembly.

[2] It is listed in the Annex to G.A. Res. 267 (III), 14 April 1949, among decisions of the Council deemed procedural.

has been a thorn in the flesh of the majority of Members. At its First Session in December 1946, the General Assembly found it necessary to request the permanent members of the Security Council to make every effort to ensure that the use of the veto would not impede the Council in reaching decisions promptly.[1] The Assembly also recommended the Council to adopt practices and procedures to assist in reducing the difficulties in the application of the voting rule in Article 27. In many resolutions on particular subjects the Assembly has since called for restraint in the exercise of the veto.

At its Second Session, the Assembly requested the Interim Committee to study and report on the whole problem of voting in the Security Council.[2] The Interim Committee studied the problem in great detail, considering one by one the categories of possible decisions by the Council. It submitted a report to the Third Session of the Assembly,[3] making various recommendations with respect to possible decisions of the Council, in some instances recommending that the decisions should be deemed procedural and in others that they should be adopted by the vote of any seven members of the Council, whether the decisions are considered as procedural or non-procedural. The general conclusions of the Interim Committee included a recommendation for consultation among the permanent members, wherever possible, to enable the Council to function effectively. On the basis of that report the Assembly recommended that the Council should deem procedural a number of decisions which were listed in its Resolution.[4] The Resolution also recommended that the permanent members agree among themselves upon the decisions with regard to which they might forebear to exercise their veto, and that they should consult together with a view to minimizing the effect of the veto as far as possible. At its Fourth Session the Assembly again called upon the five permanent members of the Council 'to broaden progressively their co-operation and to exercise restraint in the use of the veto in order to make the Security Council a more effective instrument for maintaining peace'.[5]

The list of decisions deemed procedural by the Assembly is a useful analysis and deserves the respect due to a careful study emanating from that organ. It has, however, no binding force. There is no guarantee that the Council will regard as procedural the items listed, and the list is not exhaustive. The Council has shown no noticeable variation in its practice as a result of either the special or general recommendations of the Assembly, which illustrates very clearly the inability of the Assembly to control the Council.

[1] G.A. Res. 40 (I), 13 December 1946. [2] G.A. Res. 117 (II), 21 November 1947.
[3] *Reports of the Interim Committee of the General Assembly* (5 January–5 August 1948): *Official Records of the General Assembly*, Third Session, Supplement No. 10 (A/578).
[4] G.A. Res. 267 (III), 14 April 1949. [5] G.A. Res. 290 (IV), 1 December 149.

(*g*) *The exercise of joint powers*

Probably in no field has the veto in the Security Council been more frustrating to the General Assembly than that in which a decision by both organs is required. There has been most experience of this frustration in connexion with the admission of new Members and the appointment of the Secretary-General.

(i) *Admission of new Members.* The admission of new Members is governed by Article 4 of the Charter, under which membership is open to all peace-loving states which accept the obligations contained in the Charter and, in the judgment of the Organization, are able and willing to carry out those obligations. Admission is effected 'by a decision of the General Assembly upon the recommendation of the Security Council'.

The problem arising from the failure of the Council to make recommendations in particular cases, by reason of the veto, has come before the Assembly at every regular session.[1] The Assembly has repeatedly urged the Council to reconsider applications and to have regard to the provisions of Article 4 in arriving at its decisions. It has also urged the permanent members of the Council to consult together with a view to solving the problem. It should not, however, be inferred that the attitude of the Security Council has been entirely negative, or indeed that its failure to make recommendations has been solely due to the veto. In fact, nine new Members have been admitted by the Assembly on the recommendation of the Security Council.[2] In a number of cases the absence of a recommendation has been due to the failure of the applicant state to secure seven votes in the Council. In several cases, however, where there have been as many as nine or ten votes in favour of the candidate, it has failed to obtain a recommendation because of the veto. It is with the last group of cases that the Assembly has been most concerned.

The Assembly has not been prepared to act in disregard of the need for a recommendation of the Council by purporting to admit an applicant in the absence of such a recommendation. It has rather tried to ensure that the permanent members of the Council would not vote against an applicant who satisfied the conditions set forth in Article 4. At its Second Session the Assembly asked the International Court of Justice for its opinion on two questions.[3] The Advisory Opinion of the Court, given in May 1948,[4] was to the effect (*a*) that a Member of the United Nations voting on the

[1] See G.A. Res. 35 (I), 19 November 1946; G.A. Res. 113 (II), 17 November 1947; G.A. Res. 197 (III), 8 December 1948; G.A. Res. 296 (IV), 22 November 1949; G.A. Res. 495 (V), 4 December 1950; G.A. Res. 506 (VI), 1 February 1952; G.A. Res. 620 (VII), 21 December 1952.

[2] The new Members admitted were Afghanistan, Iceland, Sweden, and Thailand (1946), Yemen and Pakistan (1947), Union of Burma (1948), Israel (1949), and the Republic of Indonesia (1950).

[3] G.A. Res. 113 B (II).

[4] *Conditions for Admission of a State to Membership in the United Nations* (*Charter, Article 4*): *Reports of the International Court of Justice, 1948*, p. 57.

admission of a state to membership is not juridically entitled to make its consent to the admission dependent on conditions not expressly provided for by paragraph 1 of Article 4, and (*b*) that, in particular, a Member of the Organization cannot, while it recognizes the conditions set forth in that provision to be fulfilled, by the State concerned, subject its affirmative vote to the additional condition that other states be admitted to membership together with that state. A solution of the problem of the admission of new Members was not brought about by that Advisory Opinion. Accordingly, at its Fourth Session the Assembly requested[1] the International Court for an advisory opinion on the following question: 'Can the admission of a state to membership in the United Nations, pursuant to Article 4, paragraph 2, of the Charter, be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission by reason of the candidate failing to obtain the requisite majority or of the negative vote of a permanent member upon a resolution so to recommend?' The opinion of the International Court was that the admission of a state could not be effected by a decision of the Assembly in those circumstances.[2]

The International Court did not in either Opinion express any view as to the validity of a veto in any given circumstances. Presidents of the Security Council have always acted on the assumption that the negative vote of one of the permanent members does operate to defeat a resolution containing a recommendation for the admission of a state, notwithstanding the fact that the resolution has received seven favourable votes. The majority of Members in the Assembly have acquiesced in this situation, but there has been increasing pressure to persuade permanent members of the Council not to exercise their veto in the case of applications for admission.[3] So far, however, the Assembly has found no solution to this problem.

(ii) *Appointment of the Secretary-General.* The Secretary-General is appointed in the same way as a decision is made to admit a new state to membership of the United Nations. It is provided by Article 97 of the Charter that he shall be appointed 'by the General Assembly upon the recommendation of the Security Council'. There was no difficulty about the appointment of the first Secretary-General in 1946, but in 1950, when the Secretary-General's term of office was due to expire, the Security Council was unable to make a recommendation because of the lack of unanimity among the permanent members. Accordingly, the Assembly

[1] G.A. Res. 296 J (IV).

[2] *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, *I.C.J. Reports, 1950*, p. 10.

[3] The Assembly appointed a Special Committee to study the whole question of the admission of new Members, which is to report to the General Assembly at its Eighth Regular Session (G.A. Res. 620 A (VII)).

made no new appointment, but simply continued the Secretary-General in office.[1] In March 1953, the Secretary-General having tendered his resignation, the question of a recommendation for the appointment of a new Secretary-General came before the Council. At the 613th meeting of the Security Council two candidates failed to receive the necessary seven votes and one candidate failed to obtain a recommendation of the Council because, although he received nine affirmative votes, there was one negative vote cast by a permanent member.[2] There seems little room for argument that the President of the Council was correct in declaring that the proposal for that recommendation was not adopted. It also seems clear that the reasoning of the International Court in its second Advisory Opinion applies to the appointment of a Secretary-General and that the Assembly cannot make an appointment in the absence of a recommendation from the Council. This may result in the office of Secretary-General being vacant and may create great practical difficulties for the Organization. Nevertheless, it does appear that in this matter the Security Council has the upper hand.[3]

V

Conclusion

The purpose of this article has been, as stated at the outset, to draw a picture of the relations between the General Assembly and the Security Council. It is left to the reader to draw his own conclusions, but it will be readily seen that the picture is neither simple nor static. The true roles of the two organs cannot be deduced merely by analysing the provisions of the Charter. It is plain from the terms of the Charter that, in matters relating to the maintenance of international peace and security, the Security Council was intended to play the major part. On occasions, the Council has shown that it can play that part, but often it has been thwarted by the veto. Consequently, it has failed to carry out its primary responsibility for the maintenance of peace and security. Driven by the determination to fulfil the Purposes and Principles of the Charter, the General Assembly has shown itself willing to use to the maximum its own functions in order to make up for the shortcomings of the Council. Where, however, the Assembly has been dependent on the recommendations of the Council it has had to suffer frustration. Perhaps, in these and in other fields, the Security Council may enjoy a change of heart. If so, it may yet assume its proper role as the guardian of the peace.

[1] G.A. Res. 492 (V), 1 November 1950.

[2] The meeting was held in private on 13 March 1953. See the Communiqué of the Security Council, S/PV. 613, 13 March 1953.

[3] At the time of preparation of this article, the Security Council was still considering the problem of a recommendation to the General Assembly for the appointment of a new Secretary-General. It is impossible to forecast what the outcome of the Security Council proceedings will be, or what solution may be found if the Council fails to make a recommendation.

STATE SUCCESSION IN RESPECT OF LAW-MAKING TREATIES

By C. WILFRED JENKS, LL.D.

I. *The contemporary problem*

DURING the period of almost ninety years which has elapsed since the conclusion in 1865 of the International Telegraph Convention, the multipartite instrument of a legislative character has become a decisive element in the development of international law. Hudson's *International Legislation* lists 257 such instruments for the period 1864–1914 and contains 670 instruments covering the period 1919–45, both figures excluding a substantial number of supplementary and subsidiary instruments. Since the Second World War this legislative effort has been resumed and intensified. The renunciation of war; the peaceful settlement of international disputes; human rights; forced labour and slavery; refugees; genocide; the protection in time of war of the wounded, sick, and shipwrecked, of prisoners and of civilians; aviation; bills of exchange and other negotiable instruments; broadcasting; commercial arbitration; commodity control arrangements; the conservation of marine resources; copyright; the suppression of counterfeiting currency; cultural relations; customs formalities; drug control; the transmission of electric power; the execution of foreign judgments; fisheries; food and drug standards; hydraulic power; industrial property; industrial relations; inland waterways; judicial co-operation; labour; load line regulations; maritime law; nationality laws; patents; postal matters; private air law; private international law; protection against animal and plant diseases and against pests harmful to agriculture; rail transport; raw materials; the régime of maritime ports; road transport; safety of life at sea; sanitary regulations, including quarantine regulations and measures of epidemic control; shipping; social security; the status of foreigners; the status of women; telecommunications; trade marks; weights and measures: these are among the subjects in respect of which intensive legislative effort has been pursued. While the instruments which have been adopted vary greatly in their scope and value and in the degree of acceptance which they have secured, their cumulative effect has been to give a substantive content corresponding to modern needs to a legal system which, as it had previously evolved by the slow growth of custom, was far too exclusively concerned with the formal structure of the relations between states and with the abnormal relationships of war and neutrality characteristic of the recurrent breakdowns of the international order. This revolutionary change in the subject-matter of international law has taken place during less than a

century in all, and in essentials in the course of a single generation. Without such a development, international law would have lost all contact with reality in an industrialized world community drawn together by economic and strategic need and the development of a common material civilization but held asunder by the clash of political and ideological forces. The development of an international legislative process on this scale, however serious its imperfections,[1] is therefore, from the broadest sociological standpoint as well as from a more purely legal point of view, the dominating fact in the whole of the historical development of the law of treaties.

It is only to be expected that the development on such a scale of a new type of treaty with so far-reaching a significance for the whole future of international law should call for some reconsideration of principles of the law of treaties which have been derived primarily from the law of contract. This has been fully recognized by leading authorities. Sir Arnold McNair, for instance, has drawn attention to the differing functions and legal character of treaties having the character of conveyances, treaties having the character of contracts, law-making treaties (some of which create constitutional international law), and treaties akin to charters of incorporation; and has urged the need to 'free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules, however inadequate, and set ourselves to study the greatly differing legal character of the several kinds of treaties and to frame rules appropriate to the character of each kind'.[2] In so doing we shall sometimes find that the heritage of the past weighs heavily upon us and that we are confronted with a mass of authority and precedent which might well appear to be conclusive unless we constantly keep in mind the two decisive elements in the situation: first, that 'the seed-bed of the traditional rules as to the formation, validity, interpretation, and discharge of treaties which swell the bulk of our textbooks, too often written in slavish imitation of their predecessors, was sown at a time when the old conception of a treaty as a compact, a bargain, a *Vertrag*, was exclusively predominant and the dawn of the new multilateral treaty had not begun';[3] and secondly, that much which is stated in the books as though it were of general application was originally intended to apply only to treaties having a contractual character and cannot appropriately be applied to treaties which are in the nature of international legislation.

[1] For which see Jenks, 'Les Instruments internationaux à caractère collectif', in *Recueil des Cours de l'Académie de Droit International de la Haye* (hereinafter cited as *Hague Recueil*), 69 (1939), pp. 451–543; 'The Need for an International Legislative Drafting Bureau', in *American Journal of International Law*, 39 (1945), No. 2, pp. 163–79; and 'The Impact of International Organisations on Public and Private International Law', in *Transactions of the Grotius Society*, 37 (1951), pp. 31–37.

[2] McNair, 'The Functions and Differing Legal Character of Treaties', in this *Year Book*, 11 (1930), pp. 100–18.

[3] McNair, loc. cit., at p. 106.

These considerations, the applicability of which to matters such as the effect of war on treaties is now widely recognized, apply with equal force to the question of the effect of changes in international status (or, to use more traditional terminology, state succession) on obligations under multipartite instruments of a legislative character. No attempt can be made here to examine the matter in relation to all possible types of change in international status. To certain types of case the rules given in the books on the basis of analogies from the law of contract may be broadly applicable, though not necessarily for the reasons traditionally adduced in support of them. There is, however, at least one type of case, that of separation or secession (probably the most important type from a practical point of view in a period characterized by a substantial increase in the independent membership of the international community), in respect of which the traditional view stated in most of the books is indefensible in principle, unreasonable in practice, and inconsistent with the long-term development of international law and international organization.

The traditional view is that a new member of the international community starts with a clean slate in respect of treaty obligations, the only clear and widely accepted exception being treaties creating local obligations which can be regarded as having the character of executed conveyances. This view developed, however, before the multipartite instrument of a legislative character had assumed its present importance and its rationale appears to have little or no application to such instruments. It is generally admitted that a new state is bound by existing rules of customary international law. This principle has, indeed, been of fundamental importance in the development of international law into a world-wide system. Without it, the law evolved by the original members of the European family of nations could never have developed into the world-embracing system which we know today. It is not clear why, now that the rules established by multipartite legislative instruments constitute so large a part of the operative law of nations, a new state should be regarded as starting with a clean slate in respect of rules which have a conventional rather than a customary origin. It has, of course, long been admitted that the rule that a new state is bound by the existing law applies to rules of conventional origin which have come to be regarded as having the force of customary law,[1] but unless obligations under multipartite legislative instruments are regarded as binding on successor states before this stage is reached we are forced to the conclusion that no amount of deliberate legislative effort by the international community can change the existing law except at the slow pace necessary for the growth of a binding international custom. How slow this pace may be is illustrated by the fact that it was still considered

[1] See, for instance, Roxburgh, *International Conventions and Third States* (1917), pp. 72–95.

doubtful during the First World War whether the Declaration of Paris of 1856, which itself represented the culmination of a long process of earlier development, had acquired the status of customary law. If the view expressed in the clean slate rule is correct, the General Treaty for the Renunciation of War and the International Slavery Convention, to give only two striking examples, are probably not binding on a new state, and even a universally ratified covenant of human rights would not be so binding. Any such conclusion impels reconsideration of the premisses on which it is based and of the relevance and cogency of the authorities invoked in support of the traditional view.

Such a revaluation of the authorities is indeed both warranted and required by three considerations: the nature of the process by which international law develops; the needs of an evolving international society the basic problem of which is to provide scope for change and for the ebb and flow of political forces and shifting power-relationships within a framework of law and order; and the developments which have been taking place in other branches of the law of state succession and which have an important bearing, both logically and practically, on the question of state succession in respect of obligations under multipartite instruments.

Westlake, writing critically of the discussion of state succession in the judgment in the *West Rand* case,[1] says of the process by which international law develops: 'The truth is that often the rules of international law resemble those of the common law in making their first appearance in a very general and crude form, which practice and discussion elaborate and fence.'[2] Many of the generalizations concerning state succession in respect of treaties to be found in the books must be regarded as hypotheses to be discarded or qualified in this process of elaboration and fencing as the nature of the problems presented by treaties of different types becomes clearer.

In this process of elaboration it is essential to have the fullest regard for the political and psychological factors involved. The psychology of newly won independence is a formidable reality, and juristic speculation on state succession which ignored it would be an altogether unprofitable exercise. The obligations of multipartite legislative instruments are not, however, badges of continuing servitude; they are a necessary part of full co-operation in the international community and participation in them must therefore be regarded as one of the hallmarks of emancipation. Fischer Williams has reduced it to a truism: 'The life of human-kind is a process of perpetual change, and legal rights cannot be made an exception to this process.'[3] If the contention that law-making treaties survive changes of

[1] *West Rand Central Gold Mining Co.* v. *The King*, [1905] 2 K.B. 391.

[2] 'Is International Law Part of the Law of England?', in *Collected Papers* (1914), p. 515.

[3] *Aspects of Modern International Law* (1939), p. 94. See also Bourquin, 'Stabilité et Mouve-

sovereignty were inconsistent with this principle it would be wholly unrealistic, but it is no more inconsistent with the mutability of human affairs than the principle that a new member of the international community is bound by existing customary international law or the principle that a change of sovereignty does not automatically change the law governing private relationships.[1] It is not a matter of perpetuating the dead hand of the past, but of avoiding a legal vacuum. Subject to any special obligations binding upon it as the result of the circumstances of its creation or recognition, the new state will have the same rights of denunciation under legislative instruments as existing states and, with the exception of the few instruments designed to effect a permanent and basic change in the law, virtually all multipartite legislative instruments now make reasonable provision for denunciation. In these circumstances, the independence of the new state is in no way impaired by the substitution of orderly processes of development and change for the uncertainty, confusion, and practical inconvenience of a legal vacuum which may be gravely prejudicial not only to the interests of other states concerned but equally to the interests of the new state itself and its citizens. The suggestion sometimes made that there is no treaty vacuum because pre-existing treaty obligations will generally continue to be binding on an existing state[2] misconstrues the nature of the problem. There *is* such a vacuum in respect of the territory and citizens of the new state, which may comprise hundreds of thousands of square miles and millions of citizens, and in a wide range of cases the effectiveness of law-making treaties which cease to be applicable to them, even temporarily, will also be impaired elsewhere.

As the law of state succession has developed there has, despite controversies and temporary setbacks (notably immediately after the South African War), been increasing emphasis on the protection of private rights.[3] Lauterpacht states the principle at issue as being that 'only in the case of states being mere agencies of force unfettered by the rule of law' can the recognition of acquired rights 'be disregarded by the events of international life. . . . The death of the individual and the changes in state sovereignty are, in relation to legal rights and obligations, crises which must be regulated by a rule of law independent of the will of the actual

ment dans l'Ordre Juridique International', in *Hague Recueil*, 64 (1938), pp. 351–72; Lorimer, *The Institutes of the Law of Nations*, vol. 2 (1884); and Jenks, 'The Significance Today of Lorimer's Ultimate Problem of International Jurisprudence', in *Transactions of the Grotius Society for 1940*, 26 (1941), pp. 35–65.

[1] *Calvin's* case, 7 Co. Rep. 17b; *Campbell* v. *Hall* (1774), 1 Cowp. 204.

[2] E.g., Mervyn Jones, 'State Succession in the Matter of Treaties', in this *Year Book*, 24 (1947), p. 374.

[3] See, for instance, Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 125–33; Feilchenfeld, *Public Debts and State Succession* (1931), notably pp. 396–827; and Wilkinson, *The American Doctrine of State Succession* (1934), pp. 37–51 and 118–26.

successor.'[1] If we accept this position in regard to private rights, important consequences appear to follow in regard to multipartite legislative instruments. A large proportion of such instruments bear directly on private rights. If these rights and any municipal legislation from which they may be immediately derived remain effective until modified in a proper manner, there is no reason why the international legislation implemented by such municipal legislation should not also remain binding in respect of the new state until modified in a proper manner; in some cases the private rights involved will or may cease to be effective if the international instrument ceases to be binding. There is also, however, a more fundamental consideration involved. The international law of the second half of the twentieth century cannot afford to give a more stable protection to private rights than it is prepared to give to the public interest as expressed in the wide network of international instruments dealing with economic and social well-being. We live in an age of rapid economic and social change, and if our legal system fails to respond to the widely felt and urgent needs of a developing international society, both its authority as a legal system and the prospect of developing a peaceful international order will be gravely prejudiced. Regression is no new phenomenon in political, economic, or social history,[2] and the future is not so assured that we can rest content with an uncritical acceptance of traditional views.

II. *The authorities*

The authorities for and against the clean slate rule can be most conveniently considered under seven heads, which have been arranged in order of convenience of exposition rather than of weight or persuasiveness:

(*a*) The views of the text writers.
(*b*) Judicial decisions and arbitral awards.
(*c*) Diplomatic practice as evidenced by diplomatic correspondence, statements of government policy made in parliamentary debates and otherwise, and legal advice given to governments.
(*d*) General treaty settlements.
(*e*) British Commonwealth practice.
(*f*) The practice of international organizations.
(*g*) Views expressed by official and unofficial bodies for the codification of international law.

A detailed survey of these authorities would require a substantial volume, but a general picture of the position may be of interest.

[1] Op. cit., p. 129.
[2] Cf. Toynbee, *A Study of History* (1934–1939), especially vols. 5 and 6 (1939).

(*a*) *The views of the text writers*

There is no recent study of state succession in respect of treaty obligations comparable in thoroughness or for grasp of principle and precedent with the standard works of Feilchenfeld[1] and Sack[2] on state succession in respect of financial obligations. The best-known monographs on the subject—those of Kiatibian[3] and Larivière[4]—both date back to 1892. There does not appear to be even one comprehensive and authoritative recent article dealing specially with succession in respect of obligations under multipartite legislative instruments. Udina, the author of the standard work on the dismemberment of the Austro-Hungarian Empire,[5] touches on the subject incidentally but suggestively in a course of Hague lectures.[6]

Kiatibian, whose monograph[7] still repays reading, while considering that only treaties relating to local obligations and to debts survive, admits that he has had doubts in regard to certain other types of treaty, notably conventions proclaiming or confirming principles of law or humanity of common interest and 'administrative' conventions, but dismisses these doubts on grounds which would no longer be generally accepted today as conclusive, such as the presumption against the continuance of obligations for fear they might prejudice vital interests, offend *amour-propre*, or limit sovereignty.

While Kiatibian expounds what may be regarded as the traditional view, Larivière,[8] also writing in 1892, adopts a markedly different approach which strikes a distinctly more modern note. He begins with a warning against the dangers of generalization. The facts of different cases are rarely identical and must be taken into consideration, and the nature and effect of different treaties must also be distinguished; good faith requires us to consider the object of the treaty; if this can no longer be fulfilled, the treaty should be regarded as terminated; where it can be fulfilled, the pledged word should continue to be respected.[9] On this principle 'treaties which have a character of general utility' survive. The expression refers to treaties participated in by the great majority of the Powers for the regulation of questions which interest them in an almost equal degree; illustrations are the postal, telegraphic, and telephonic conventions, the Geneva convention on the care of the wounded, the Brussels convention for the abolition

[1] *Public Debts and State Succession* (1931).

[2] *Les Effets des transformations des États sur leurs dettes publiques et autres obligations financières* (1927).

[3] *Conséquences juridiques des transformations territoriales des États sur les traités* (1892).

[4] *Des conséquences des transformations territoriales des États sur les traités antérieures* (1892).

[5] Udina, *L'estinzione dell' Impero Austro-Ungarico nel diritto internazionale*, 2nd ed. (1933).

[6] Udina, 'La Succession des états quant aux obligations internationales autres que les dettes publiques', in *Hague Recueil*, 44 (1933) (ii), pp. 669–770.

[7] Op. cit. [8] Op. cit. [9] Ibid., p. 78.

of the slave trade, or the St. Petersburg declaration concerning explosive bullets. These conventions represent for civilized nations something analogous to the body of rules established by long usage which are sometimes described as 'le droit des gens européen'.[1] While his terminology may be thought to require more careful definition, Larivière anticipated the contemporary problem and must be regarded as having made a significant contribution towards a juristic analysis calculated to facilitate its solution.

Udina,[2] who, like Kiatibian and Larivière, supports his argument with a considerable wealth of historical illustration, acknowledges succession in respect of various types of treaty, including localized obligations of general interest.[3] By localized obligations of general interest he means obligations resulting from what other writers have called the public law of Europe; he uses the expression with reference to obligations established in the general interest of all states, this being at any rate the intention of the contracting parties who act as tacitly recognized organs of the international community for the purpose.[4] In Udina's view, the localization of the obligation is essential in order to make it transmissible and this principle accordingly would not apply to the general obligations of Articles 108 to 114 of the Final Act of Vienna, or to the Statute annexed to the Barcelona Convention of 1921 on navigable waterways of international concern, or to the General Conventions of 1923 on international railways, maritime ports, and the transmission of electric energy and hydraulic power.[5] There has, however, been a marked tendency since the First World War to accept the principle of succession in respect of certain general conventions, such as the Hague Conventions on private international law.[6] Udina mentions an interesting case in which the Yugoslav maritime authorities regarded the 1910 Brussels conventions on collision and salvage as applicable in Yugoslavia as a successor to Austria-Hungary, but in which the position was subsequently regularized by the deposit of fresh ratifications.[7] In brief, Udina, without dealing in any detail with multipartite instruments other than those creating localized obligations and while declining to give any wider application to the principle which he applies to localized obligations, tends to admit that the position is fluid and the future uncertain. The remaining literature on the subject falls into three groups: monographs and articles on state succession in general; works on the law of treaties; and general works on international law.

The general literature of state succession is too extensive for detailed

[1] Larivière, op. cit., p. 83.

[2] Udina, 'La Succession des états quant aux obligations internationales autres que les dettes publiques', in *Hague Recueil*, 44 (1933) (ii), pp. 665–70.

[3] Loc. cit., pp. 705–13. [4] Ibid., p. 705. [5] Ibid., p. 708.

[6] Ibid., p. 763; see the cases referred to at p. 124 below. [7] Loc. cit., p. 764.

examination here;[1] it must suffice to take as examples the views of Huber, Cavaglieri, Keith, and Wilkinson, whose positions cover the full range of divergent and conflicting views.

Huber's *Die Staaten-Succession*, although published in 1898 and not revised since, continues to be the leading monograph on the subject. It combines a sociological approach[2] with a detailed survey of a considerable body of state practice as of 1898. Huber's view is that, in the case of a state formed by separation from an old one, all treaties pass over, even in the case of commercial treaties and capitulations, but not alliances and guarantees.[3] If succession is admitted in respect of treaties it cannot be denied in respect of *Gesellschaftsverträge* which Huber defines as treaties calling for a continuous series of acts or omissions. In respect of obligations based on the great normative agreements of the Powers, the term 'succession' is inappropriate since every new state entering a legal community is by that fact, irrespective of its own wish, bound by the rights and obligations of the community. The reasoning that a new state is freed of its obligations because it intimates by its secession that it no longer wishes to be bound by them Huber dismisses as naïve; a treaty does not *ipso jure* lose its validity because there are two subjects instead of one in relation to a third party. Even in cases of conquest Huber considers that treaties pass over in theory.[4] He admits that in practice the operation of the principle is limited by such considerations as the fact that some treaties presuppose the continued existence of the same state and, in cases of conquest, the supersession of old treaties by the extension to the conquered territory of the treaties of the conquering state. At one stage he appears to admit, in respect of both secession and conquest, that either party may have an option to denounce, but this point is not entirely clear. When the fullest allowance has been made for these qualifications, so conspicuous a dissent from the general current of opinion by so outstanding an authority, based as it is on a special study of state succession

[1] It includes: Selosse, *Traité de l'annexion au territoire français et de son démembrement* (1880); Cabouat, *Des annexions de territoires et de leurs principales conséquences* (1881); Gabba, 'Successione di stato a stato', in *Quistioni de diritto civile*, 2nd ed. (1885), p. 375; Fischer, *Das Problem der Identität und der Neuheit* (1892); Appleton, *Des effets des annexions de territoires sur les dettes de l'Etat démembré ou annexé et sur celles des Provinces, Départements, etc., annexés* (1895); Huber, *Die Staaten-Succession* (1898); Gidel, *Des effets de l'annexion sur les concessions* (1904); Keith, *The Theory of State Succession, with Special Reference to English and Colonial Law* (1907); Cavaglieri, *La dottrina della successione di Stato a Stato e il suo valore giuridico* (1910); Schönborn, *Staatensukzessionen* (1913); Harrison Moore, *Act of State in English Law* (1906); Wilkinson, *The American Doctrine of State Succession* (1934); *Annuaire de l'Institut de droit international*, 36 (1931) 1, pp. 185–255, and 38 (1934), pp. 473–89. Two monographs concerning particular cases are of special interest: see Accioly, *O reconhecimento da independência do Brasil* (1927), and Udina, *L'estinzione dell' impero austro-ungarico nel diritto internazionale* (1933); further monographs of this type would be most useful. Concerning the earlier literature, which does not include any relevant monographs, see the references given by Feilchenfeld, *Public Debts and State Succession* (1931), pp. 25–34, 63–68, 171–4 and 300–10.

[2] For which cf. the same author's *Die soziologischen Grundlagen des Völkerrechts*, 2nd ed. (1928).

[3] At pp. 136–8.

[4] At pp. 150–4.

in general which has still not been superseded, cannot be lightly disregarded.

Cavaglieri, who originally wrote on the subject in 1910 and restated his view in 1934,[1] recognizes that annexing states have frequently accepted the obligations of the treaties of an annexed state, but regards all such cases as voluntary acceptances on grounds of equity, convenience, or political interest which create a new legal relationship with the third party concerned which is identical in content with but different in legal character from that of the annexed state.[2] This construction of the voluntary acceptance of a new legal relationship identical in content with the old may be a fair explanation of some of the confused and conflicting precedents revealed by an examination of diplomatic practice, but it is surely artificial to base upon it any conclusions of general validity.

Keith's *Theory of State Succession with Special Reference to English and Colonial Law*, published in 1907, has been widely relied upon by English-speaking writers and contains much valuable material and suggestive argument, but Feilchenfeld has not unfairly described it as 'a brief rather than an entirely detached opinion';[3] it makes far too little allowance for the evolutionary elements in the development of international law and practice and the assumptions on which it proceeds are so consistently negative in character that they seriously impair the value of many of the conclusions reached. Keith's basic thesis is that no treaties are inherited by a conqueror or cessionary state but that all his treaties extend themselves over the conquered or ceded territory.[4] The evidence from practice, he argues, is all in favour of the lack of continuity in treaty obligations; the exceptions are mostly of a special nature and the cases of great European settlements are 'of no real value as law'.[5] On the other hand, the evidence against succession is 'copious and distinct'[6] and 'the facts seem, therefore, to show clearly that all treaties go by the board'.[7] Keith's facts relate, however, almost entirely to bilateral treaties and mainly to commercial treaties. Even in respect of these, he is constrained by the facts to make one concession. Speaking of navigation and railway treaties he says such treaties are usually essentially advantageous to both parties and are accordingly tacitly or informally renewed either by being acted upon or by an exchange of notes. If, of course, they are acted on, the states estop themselves from denying

[1] 'Effets juridiques des changements de souveraineté territoriales', in *Revue de droit international et de législation comparée*, 3rd series, xv (1934), pp. 219–48; cf. *La dottrina della successione de Stato a Stato e il suo valore giuridico* (1910), and his report in *Annuaire de l'Institut de droit international*, 36 (1931), 1, pp. 185–223.

[2] Loc. cit., pp. 224–5.

[3] *Public Debts and State Succession* (1931), p. 404.

[4] *Theory of State Succession* (1907), p. 17.

[5] Ibid., p. 19.

[6] Ibid.

[7] Ibid., p. 20.

that they have consented to renew the treaty.[1] In a later passage, developing the argument in the form of a criticism of Huber, he adds:

'the new State formed by separation has before it the choice of following the same methods of action relative to a third party as its predecessor or to strike out a new line. If it adopts the former course then it tacitly or expressly forms for itself a new treaty between new parties with the third party. On this view the treaty is a *res inter alios acta*. The new State cannot step into the treaties of its mother country or the conqueror into the treaties of its conquest.'[2]

The passage is not entirely clear, but the contention appears to be not that the new state has an option to maintain the treaty but that a new treaty in identical terms may be concluded by tacit consent. To this extent, Keith's position resembles that of Cavaglieri, but his presentation of it strengthens the impression that this is a somewhat artificial solution of the problem, which is not made more convincing by the extent to which, as presented by Keith, it relies on the *res inter alios acta* argument or by the abrupt dismissal of the great European settlements as 'of no real value as law'. Keith's argument on these points has no real application to the multipartite legislative instrument.

Wilkinson's treatment of the subject[3] is far more discriminating and sophisticated. In the light of United States practice he concludes that in cases where a state undergoing a transfer of sovereignty is able, after the transfer and because of the actual political and economic conditions, to execute the provisions of treaties previously contracted, the treaties of such acquired territory will not be considered terminated. The criterion of judgment is, therefore, the ability of an acquired territory to perform its previous treaty obligations. This ability, in turn, is judged on the basis of the *de facto* conditions existing in the territory involved. It has been found that *de facto* conditions do not warrant the continuance of treaties in cases of complete annexation and absorption. On the other hand, it usually has been found that the *de facto* conditions do warrant the continuation of treaties in cases of federation, and in cases of the division of an old state into one or more independent parts.[4] On the basis of this criterion, multipartite legislative instruments would generally remain binding upon new states. Wilkinson completes his analysis by drawing a distinction between 'political' and 'civil' treaties and conventions. Political treaties are contracted by the state for the protection, security, development, and operation of the state itself, its end, aims, and purposes, as a distinct and unique being. 'Civil' agreements are contracted by a state in order to protect and regulate the rights, interests, and intercourse of its nationals at home and abroad, a purpose which is held in common by most of the sovereign

[1] Keith, op. cit., p. 20.
[2] Ibid.
[3] Wilkinson, *The American Doctrine of State Succession* (1934).
[4] Ibid., pp. 115–16.

states of today. These two groups of agreements, 'political' and 'civil' conventions, are treated differently because of two fundamental purposes of the state: the protection of its juristic concept of sovereignty; and the protection of private rights and interests. In contracting 'political' agreements, the purposes of the ceding sovereign and those of the annexing state are not the same. A successor state does not desire to wear the old clothes of its predecessor. Therefore the new state applies the rule that one state cannot be legally bound by the promises of another, and the 'political' agreements of the old state do not bind it. In the case of 'civil' treaties the purposes of the various states are approximately, and fundamentally, the same, that is, the protection of private property and rights at home and abroad. In carrying out this purpose nations have entered into treaties on the basis of the commercial, legal, geographic, or economic conditions existing in a particular territory, and on the assumption that the parties to the treaty were able to perform the obligations of the conventions. If the conditions upon which such treaties were based remained the same, and if there were in the territory involved a government able to execute the treaty stipulations, there would be no reason for the abrogation of such treaties merely because one of the parties had undergone a change of sovereignty. A change of sovereignty may or may not alter one of the conditions upon which a 'civil' treaty is founded. It is because this is true, and because of the number of variables involved, that is, the political, economic, and social conditions and the various forms of state succession, that one finds such a diversity in the effects of a state succession on treaties.[1] If the criterion is formulated in this manner a large proportion of contemporary multipartite legislative instruments will once again survive.

Among the writers on treaties who give special attention to state succession in respect of treaty obligations are McNair, Crandall, and Chailley.

McNair,[2] stating British practice primarily on the basis of opinions of the Law Officers and other legal advice given to the United Kingdom Government, reaches the following cautious conclusion:

> 'It is believed to be the view of the United Kingdom Government that the general position governing the treaty position of truly new States is that newly-established States which do not result from a political dismemberment and cannot fairly be said to involve political continuity with any predecessor, start with a clean slate in the matter of treaty obligations, save in so far as they may be assumed by them in return for the grant of recognition to them or for other reasons connected with their establishment, and except as regards the purely local or "real" obligations of the State formerly exercising sovereignty over the territory of the new State.'

It will be appreciated that this statement includes three major groups of qualifications.

[1] Wilkinson, op. cit., pp. 126–8.

[2] *The Law of Treaties* (1938), p. 450.

Crandall,[1] summarizing United States practice, is also cautious:

'A State formed by separation from another, whether the personality of the original State still exists or is completely lost by disintegration, succeeds to such treaty burdens of the parent State as are permanent and attached to the territory embraced in the new State. . . . The doctrine of the liability of the seceding portion to treaty obligations of the parent State has in some instances been asserted in latitude sufficient to include those of a purely national character. Upon what principle of law the doctrine is based is not clear.'

According to Chailley,[2] practice is very uncertain but does not justify the conclusion that there is any positive rule of international law which rules out the idea of succession to obligations arising out of treaties. If the fiction of the personality of the state is discarded and the binding force of treaties is explained by the *règle de l'acte contraire* (the essence of which is that treaties, like legislation, are binding until abrogated in a proper manner),[3] treaties are not terminated automatically by the disappearance of a state or the creation of a new state.[4] They remain binding until regularly abrogated. As many treaties are concluded *intuitu personae*, they will fall, but other treaties will pass to annexing or newly formed states. This will be the position in respect of law-making treaties (which proclaim general rules laid down with a view to a better organization of the international community) and real treaties (which relate exclusively or specially to dismembered territory). It does not follow that all law-making treaties and all real treaties pass; it is a *question d'espèce* in each case.[5] This altogether different approach converges towards the positions of McNair and Crandall to an extent which suggests that if each of the three lines of approach were to be further explored and developed with special reference to the problems of the multipartite instrument they would reach much the same result.

It is primarily in general works on international law that the matter is dealt with in a more dogmatic spirit. A large number of the text-writers are emphatic in their opinion that a new state starts with a clean slate in respect of treaty obligations, and names of the highest authority can be quoted in support of this view. Among leading British writers, for instance, Hall,[6] Holland,[7] Oppenheim,[8] and Brierly[9] are in substantial agreement upon the point. Westlake, however, does not commit himself to the clean slate rule.[10]

This strangely unempirical dogmatism on the part of leading British writers, qualified by the more reserved positions of Westlake and McNair,

[1] *Treaties: Their Making and Enforcement*, 2nd ed. (1916), pp. 434–9.
[2] *La Nature juridique des traités internationaux* (1932), pp. 131–59.
[3] Op. cit., pp. 119–30. [4] Op. cit., p. 155. [5] Ibid., pp. 155–6.
[6] *International Law*, 8th ed. (1924), pp. 114–15, § 27.
[7] *Lectures on International Law*, edited by Walker (1933), p. 99.
[8] *International Law*, vol. i (4th ed., 1928), p. 173, § 84.
[9] *Law of Nations*, 4th ed. (1949), pp. 136–7.
[10] *International Law*, Part I, 2nd ed. (1910), pp. 59–85.

appears to have been unduly influenced by the general attitude towards state succession during the aftermath of the South African War as expressed in the *Report of the Transvaal Concessions Commission*,[1] the *West Rand* case,[2] and Keith's *Theory of State Succession*.[3] This attitude, although vigorously criticized at the time by Sir Frederick Pollock[4] and by Westlake[5] himself, appears to have had an influence extending far beyond the facts out of which it arose. The earlier British view, as expressed by Phillimore,[6] Creasy,[7] and Sherston Baker,[8] was different, and we shall see in due course that the practice followed in the constitutional development of various parts of the Commonwealth towards independent international status, although partly to be explained by the continuance of a common allegiance to the Crown and the rule that changes in the internal organization of a state do not affect its international obligations, is consistent with and may well have been influenced by these earlier attitudes.

Among American writers the weight of authority is more evenly divided. Wheaton,[9] Taylor,[10] Hershey,[11] and Fenwick[12] incline towards the clean slate rule. Kent,[13] Field,[14] Halleck,[15] and Woolsey[16] take the opposite view. Hyde[17] and Stowell[18] take intermediate positions.

There is a comparable division of opinion among Latin-American writers, with Accioly,[19] Antokoletz,[20] Podesta Costa,[21] Sierra,[22] and Ursua[23] inclining towards the clean slate rule (though stating it in terms which make it clear that they are thinking of instruments of a contractual character) and Bello,[24] Calvo,[25] and Bustamente[26] contemplating succession in

[1] Cmd. 623 of 1901.
[2] [1905] 2 K.B. 391.
[3] 1907.
[4] In *Law Quarterly Review*, 16 (1900), p. 1.
[5] 'The Nature and Extent of the Title by Conquest', in *Law Quarterly Review*, 17 (1901), pp. 392–401, reprinted in *Collected Papers* (1914), pp. 475–89; see also *Collected Papers*, pp. 490–518, and *International Law*, Part I, 2nd ed. (1910), pp. 81–83.
[6] Phillimore, *International Law*, vol. i, 3rd ed. (1879), pp. 211–12.
[7] *First Platform of International Law* (1876), p. 145.
[8] *First Steps in International Law* (1899), pp. 35–36.
[9] *Elements of International Law*, 8th ed., by Dana (1866).
[10] *International Public Law* (1901), § 166.
[11] *Essentials of International Public Law*, 2nd ed. (1927), § 130.
[12] *International Law* (1924), pp. 118–20.
[13] *Commentary on International Law*, Abdy's ed. (1878), p. 95.
[14] *Outline of an International Code*, 2nd ed. (1876), Article 24.
[15] Halleck's *International Law*, vol. i, 4th ed. by Sherston Baker (1898), p. 97.
[16] *International Law*, 6th ed. by Woolsey (reprinted 1901), pp. 38–39.
[17] *International Law*, vol. ii, 2nd revised ed. (1945), p. 1539.
[18] *International Law—A Restatement of Principles in Conformity with Actual Practice* (1931), pp. 44–45.
[19] *Direito internacional público*, vol. i, 1st ed. (1933), paras. 244 and 245.
[20] *Tratado de Derecho internacional público*, vol. i, 2nd ed. (1928), para. 195.
[21] *Manual de Derecho internacional público* (1947), paras. 52 and 53.
[22] *Tratado de Derecho internacional público* (1947), p. 126.
[23] *Derecho internacional público* (1938), p. 274.
[24] *Principios de derecho internacional* (1833), cap. 1 (8), p. 149 in 1946 edition by Caldera.
[25] Calvo, *Le Droit international théorique et pratique*, vol. i, 5th ed. (1896), p. 100.
[26] *Derecho internacional público*, vol. iii (1936), p. 321.

certain cases. Bustamente appears to except multipartite instruments of an administrative character (an expression which he uses to cover all instruments on economic and social subjects) from the clean slate rule.

In general, continental writers incline against succession,[1] but many of them, notably Fiore,[2] Sibert,[3] and Guggenheim,[4] recognize the problems presented by their own solution of the question and the inconsistencies of existing practice, while Huber[5] and Lapradelle–Politis[6] are significant dissenting voices.

Despite this impressive weight of opinion, it is not unreasonable to argue that the acknowledged doctrine of the textbooks is not good law. In the standard books there are abundant traces of uncritical repetition, and the doctrine can be attacked as juristically faulty and historically inaccurate. It was with specific reference to state succession (though perhaps primarily with reference to succession in respect of financial obligations) that Hall wrote: 'The subject is one upon which writers on international law are generally unsatisfactory. They are incomplete and they tend to copy one another.'[7] Most of the writers whose views have been considered are thinking in terms of the old-fashioned bilateral treaty. To such treaties, unquestionably contractual in character, the *res inter alios acta* maxim was fully applicable. It is doubtful whether it can be applied in the same way to the multilateral legislative treaty of modern times. The exception in favour of executed treaties admitted by the great majority of writers lends some support to the view here suggested that this maxim, which is the essential juristic basis of the theory of non-succession, is only applicable to treaties of the character of contracts. The only other type of treaty familiar to the old writers, the executed treaty or conveyance, they except from the rule. More recent writers have repeated their view without realizing that the modern emergence of the legislative treaty has made it necessary to

[1] Bluntschli, *Le Droit international codifié*, 2nd ed. (1874), Articles 48–49; Martens, *Traité de droit international public*, vol. i, § 68 (1883 ed.); Pradier-Fodéré, *Droit international public*, vol. i (1885 ed.), §§ 156 and 157; Fauchille, *Traité de droit international public*, vol. i (1922), Part I, §§ 216 and 217; Sibert, *Traité de droit international public*, vol. i (1951), p. 218; Fiore, *Droit international codifié* (1911 ed.), Article 150; Despagnet, *Cours de droit international public*, §§ 100 and 101; Liszt, *Das Völkerrecht* (French ed.), p. 195; De Louter, *Le Droit international public positif*, vol. i (1920), pp. 229–30; Strupp, *Éléments de droit international public* (French translation) (1927 ed.), pp. 57–58; Rivier, *Principes du droit des gens*, vol. i (1896), pp. 216–17; Hartmann, *Institutionen des praktischen Völkerrechts*, 2nd ed. (1878), para. 13; Holtzendorff, *Encyclopädie der Rechtswissenschaft*, 5th ed. (1889–90), p. 1289; Hatschek, *An Outline of International Law* (translated by C. A. W. Manning, 1930), p. 129; Ross, *A Textbook of International Law* (1947), pp. 127–9; Guggenheim, *Lehrbuch des Völkerrechts*, vol. i (1948), pp. 425–8; *Traité de droit international public*, vol. i (1953), pp. 463–5; and Charles Rousseau, *Principes généraux du droit international public* (1944).

[2] *Droit international codifié* (1911 ed.), Article 150.

[3] Sibert, *Traité de droit international public*, vol. i (1951), p. 218.

[4] *Lehrbuch des Völkerrechts*, vol. i (1948), pp. 425–8; *Traité de droit international public*, vol. i (1953), pp. 463–5.

[5] See p. 113 above.

[6] See pp. 122–3 below.

[7] *International Law*, 3rd ed. (1890), p. 97.

state a further qualification to the orthodox doctrine. It is now generally admitted that war has not the same effect on multilateral legislative treaties as upon bilateral contractual ones and it is surely not fanciful to suggest that such treaties survive changes of sovereignty just as they survive the outbreak of war.

(b) Judicial decisions and arbitral awards

Judicial and arbitral authority on the question is scanty. To assert or claim to have proved a negative is as hazardous in law as in logic, but no trace has been found of any international decision or arbitral award which clearly applies the clean slate rule to a law-making treaty. The point has never been discussed by the Permanent Court of Arbitration, the Permanent Court of International Justice, or the International Court of Justice; there is no relevant case in the *United Nations Reports of International Arbitral Awards*[1] and no relevant international decision or award in the *Annual Digest and Reports of Public International Law Cases*.

The original *Pious Fund of the Californias* case arbitrated by Sir Edward Thornton in 1875[2] related to the effect of the cession of territory on private rights, but the subsequent Permanent Court of Arbitration case of 1902 relating to the effect of Sir Edward Thornton's award[3] did not involve any state succession point. In the *Island of Palmas* case the United States claimed territorial sovereignty as successor in title to Spain.[4] Otherwise no state succession points have arisen before Permanent Court of Arbitration tribunals.

In the *Tunis and Morocco Nationality Decrees* case[5] the Permanent Court of International Justice held that the continued validity of treaties concluded between Great Britain and Tunis and Morocco respectively before they became French protectorates was not a matter solely within the domestic jurisdiction of France, but it was not called upon to discuss the substance of the matter. In the *Free Zones of Upper Savoy and the District of Gex* case[6] there is a passing reference to the arrangements governing the St. Gingolph zone having 'the character of a treaty stipulation which France must respect as Sardinia's successor in the sovereignty over the territory in question'. In the *Jurisdiction of the European Commission of the Danube between Galatz and Braila* case[7] there is a brief reference to the

[1] These now cover the period 1920–41 with the exception of Permanent Court of International Justice and claims cases.

[2] Scott, *The Hague Court Reports* (1916), pp. 48–53.

[3] Ibid., pp. 3–7.

[4] Ibid. (2nd series) (1932), pp. 83–131.

[5] *P.C.I.J. Reports*, Series B, No. 4, p. 29. (Regarding the contribution of the Permanent Court of International Justice to the development of the law of state succession see generally Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 95–98.)

[6] *P.C.I.J. Reports*, Series A/B, No. 46, p. 145; see also Series A, No. 24, p. 17.

[7] Ibid., Series B, No. 14, p. 54.

pre-existing 'state of things' being 'binding upon Roumania when she became in 1878 an independent Power and was admitted, as the territorial sovereign of a great part of the Lower Danube, to the European Commission', but the case was decided on the basis of the factual situation prior to the First World War. The Permanent Court of International Justice also had occasion to consider state succession in respect of private rights (*Settlers of German Origin in Poland* case,[1] *German Interests in Polish Upper Silesia* case)[2] and concessionary contracts (*Mavrommatis* case,[3] *Lighthouses* case,[4] *Lighthouses in Crete and Samos* case).[5] The International Court of Justice has given an important opinion on succession of international organizations in respect of treaty obligations in the *International Status of South-West Africa* case.[6] In the *United States Nationals in Morocco* case the Court had to consider the effect of the establishment of the Protectorate of Morocco. It held that under the Treaty of Fez of 1912 Morocco remained a sovereign state but made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco and, in principle, all of the international relations of Morocco. In these circumstances 'France, in the exercise of this function, is bound not only by the provisions of the Treaty of Fez, but also by all treaty obligations to which Morocco had been subject before the Protectorate and which have not since been terminated or suspended by arrangement with the interested states'.[7] In a later passage the Court appears to imply that the treaties concluded by France during the Protectorate would remain binding on Morocco on the termination of the Protectorate, but there is no clear ruling on the point, which was not directly at issue.[8] The dissenting opinion[9] appears to follow the Opinion of the Court on the first point; the second did not arise on the view taken by the dissentients of the effect of the treaties in question; the dissenting opinion also emphasizes the character of the Act of Algeciras as 'an agreed multilateral Convention directly binding upon Morocco and the United States as well as the other signatory powers'.[10] While none of these decisions is directly relevant, it is significant that in none of them is the clean slate rule invoked and that all of them are consistent with the general thesis presented in this article.

A careful examination of Moore's *International Arbitrations*[11] and *International Adjudications*[12] has disclosed only one relevant case, that of *The*

[1] *P.C.I.J.*, Series B, No. 6, p. 36.
[2] Ibid., Series A, No. 7.
[3] Ibid., No. 5.
[4] Ibid., Series A/B, No. 62.
[5] Ibid., No. 71.
[6] *I.C.J. Reports*, 1950, pp. 128–92.
[7] Ibid., 1952, p. 188.
[8] Ibid., pp. 193–6.
[9] Of Judges Hackworth, Badawi, Levi Carneiro, and Sir Benegal Rau.
[10] *I.C.J. Reports*, 1952, p. 217.
[11] Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, 6 vols. (1898).
[12] Moore, *International Adjudications*, Modern Series, 6 vols. (1929–33).

Mechanic.[1] In this case the Guayaquil Mixed Commission set up by the United States and Ecuador held in 1862 that the Treaty of 1795 by which Spain and the United States accepted the principle of 'free ships, free goods' was binding upon Colombia after she had declared herself independent. The opinion delivered on behalf of the Commission by Commissioner Hassaurek was expressed in the broadest possible language:

'When this treaty was made, the subsequent Republic of Colombia was part of the Spanish Empire, and the public laws and treaties of Spain were binding on all her subjects, whether in Europe or America. From the obligations that treaty imposed on the whole Spanish nation the Republic of Colombia could not and did not free herself by her subsequent declaration of independence. Third parties had acquired rights and interests under the treaty which Colombia was not at liberty to disregard, and the United States had a right to expect that the Colombian cruisers and prize courts would respect the property covered by the American flag.

'That a state never loses any of its rights, nor is discharged from any of its obligations, by a change in the form of its civil government, is one of the fundamental principles of international law. It applies, by analogy, to cases such as the one before us, where one part of a nation separates itself from the other. It is evident that on the creation of a new state, by a division of territory, that new state has a sovereign right to enter into new treaties and engagements with other nations; but until it actually does, the treaties by which it was bound as a part of the whole state will remain binding on the new state and its subjects.'[2]

Although the opinion also relies in part on Ecuador, New Grenada, and Venezuela having invoked the Spanish treaties and states that 'Ecuador, therefore, having fully recognised and claimed the principle on which the case now before us turns, whenever from such a recognition right or advantages were to be derived, could not in honour and good faith deny the principle when it imposed an obligation',[3] it is clear that the case was decided primarily on the basis of the principle itself and not on the ground of estoppel. As the claim on which the case was based was apportioned on the dissolution of Gran Colombia, the same facts also came before a United States and Venezuela Commission. This part of the claim was accepted by the Caracas Commission of 1867–8 but disallowed by the 1885 Commission in *Amos B. Corwin* v. *Venezuela* on complex grounds, one of which was that Colombia was entitled to adapt Spanish prize law on becoming independent,[4] a view which assumes that the treaty was not binding on the Colombian courts.[5] In support of this view the Venezuelan Commission cited decisions of the United States Supreme Court.[6] In these circumstances, the *Mechanic* case is sometimes regarded as a debatable precedent. Lapradelle–Politis,[7] on the other hand, approve of the decision and discuss its significance

[1] Also known as *Atlantic and Hope Insurance Co.* v. *Ecuador*.
[2] Moore, *International Arbitrations*, vol. iii, p. 3223.
[3] Ibid., p. 3226; see also vol. ii, pp. 1574–5.
[4] Ibid., vol. iii, p. 3213.
[5] Ibid., p. 3220.
[6] Ibid., p. 3213.
[7] *Recueil des arbitrages internationaux*, vol. ii, pp. 433–40.

in a *note doctrinale* the conclusions of which are that termination is not an invariable rule, that it only applies to those treaties which cannot from their nature survive the changed state of affairs, and that treaties creating real rights (i.e. conveyances) and those formulating general rules of law (i.e. international legislation) remain in force. The treaty at issue in the *Mechanic* case, though laying down a rule of law also embodied in many other instruments and ultimately incorporated in the Declaration of Paris of 1856, was itself a bilateral treaty. The case was therefore by no means the strongest one by which to test the validity of the principle stated in the decision, and the principle may, and it is submitted should, be regarded as valid even if its applicability to this particular case be thought open to debate.

A decision of the Mixed Tribunals of Egypt which has some slight bearing on the question has been traced. In *Bencini* v. *The Egyptian Government and the Government of the Sudan*,[1] the Mixed Tribunal of First Instance at Cairo, Civil Chamber, was called upon to consider whether the territorial extent of its jurisdiction, which was based upon international agreements, ceased to include the Sudan, formerly an integral part of Egypt, after its reconquest from the Mahdi and the establishment of the condominium. It took the view that it was neither necessary nor within its competence to determine the treaty rights of the Powers interested in the Mixed Tribunals since private parties were bound by Article 2, § 2, of the Judicial Rules of Organization debarring it from taking cognizance of acts of sovereignty and only the interested Powers were entitled to argue that their rights could not be modified by the Anglo-Egyptian Agreement giving a distinct status to the Sudan. While no particular weight can be attached to this decision, which relates to facts of a complex and unusual character, it is significant that the Tribunal did not, in the manner of the text writers, assert dogmatically a general rule that there do not apply to a new international unit any but the purely local treaty obligations of its predecessor in title. The Tribunal indicated in its judgment that in these circumstances it 'need not then investigate whether the Convention fixing the right of conquest is not legally circumscribed, in a just and equitable way, and it need not concern itself whether the Powers have acquiesced in that Convention or whether, in the absence of a formal adhesion, the questions dealt with in the Convention are, until further orders, suspended so far as concerns the Powers interested therein'. The passage is *obiter* and there is no specific suggestion that the capitulation treaties retained their force in the Sudan despite its new status, but the Tribunal would appear to have approved Fiore's view that the rights of other states could be prejudiced by separation unless they had in some way indicated their assent.

[1] *American Journal of International Law*, 4 (1910), pp. 945 ff.

The number of relevant decisions by national courts does not appear to be large. The leading English and North American case books contain no relevant cases. A number of national decisions relating to state succession in respect of international conventions are reported in the *Annual Digest*, but a large proportion of these relate to conventions which were clearly contractual in character, to cases of annexation which present problems quite different from those which arise in cases of separation or secession, or to cases relating to protectorates, real unions, or federal states in which the special facts of the case were decisive. There are, however, a number of cases relating to the Hague conventions on private international law which in a sense bear on the point under examination, though they approach it from the standpoint of the rights rather than the obligations of a successor state. It is difficult to draw any clear conclusion from these cases. They include conflicting German decisions that the conventions did and did not apply to Czechoslovakia;[1] Dutch[2] and French[3] decisions that the conventions did not apply to Czechoslovakia; Swiss decisions that the conventions did not apply to Czechoslovakia[4] or Poland;[5] and an Italian decision that the conventions did apply to Czechoslovakia.[6] Among other cases not included in the *Annual Digest* may be mentioned a German decision that Austria, although regarded as a new state, had succeeded to Austria-Hungary,[7] and Italian decisions that the Free State of Fiume had succeeded to Hungary,[8] and Hungary to Austria-Hungary.[9] On the whole, these decisions appear to support the clean slate view, but the weight which can be given to them is qualified by three considerations; most of them date back to the years immediately following the First World War before the problem we are now examining had been brought into focus; none of the decisions is by a court of last resort; and it is only natural that when a court has to consider whether to require security for costs it should take no risk of leaving a local defendant without protection if there is any question concerning the rights of a foreign plaintiff or the possibility of effectively recovering costs from him. In these circumstances, these cases appear to be far from decisive. The only case relating directly to the obligations of a successor state under a multipartite legislative instrument is a decision of the Polish Supreme Court that the Berne Convention of 1890 on the international transport of goods by rail did not apply to Poland in

[1] *Annual Digest*, 1919–22, p. 69, Note.
[2] *Czechoslovakian Co-operative Society* v. *Otten*, *Annual Digest*, 1923–4, Case No. 42.
[3] *Établissements Coulberez* v. *Maison Stein*, *Annual Digest*, 1925–6, Case No. 63.
[4] *In re J.Z.*, *Annual Digest*, 1919–22, Case No. 43.
[5] *In re M. and O.*, *Annual Digest*, 1919–22, Case No. 42.
[6] *Annual Digest*, 1935–7, p. 141.
[7] *Zeitschrift für internationales Recht*, 29 (1921), p. 94.
[8] *Foro Italiano*, 1 (1921), p. 210; *Giurisprudenza italiana*, 1 (1921), pp. 2, 13 ff.
[9] *Foro Veneto* (1931), col. 289.

virtue of ratification by Austria.[1] This is hardly a particularly strong case in view of Poland having been constituted with territory previously forming part of three different states. Although that case does not relate to a multipartite instrument, it is of some interest that it was held in Palestine in 1947 that an extradition agreement with the mandated territory of Lebanon survived Lebanese independence.[2]

The paucity of judicial and arbitral authority on the subject is not particularly surprising, and the only conclusion which it is proposed to draw from it is that the sweeping dogmatism of so many of the textbooks finds no justification in such case law on the subject as exists. In this perspective the *Mechanic* case should be regarded, not as an anomaly which has ceased to be of weight in view of the subsequent development of the law, but rather, in the manner of Lapradelle–Politis, as a groping and perhaps premature attempt to distinguish treaties (not necessarily multilateral) which are legislative in character in the sense that they contain rules of law intended to be of a permanent nature and not merely contractual commitments between the parties.

(*c*) *Diplomatic practice*

The evidence of diplomatic practice, as recorded in the leading digests of diplomatic correspondence, statements of government policy, and legal advice given to Governments, is confused and indecisive.

An extensive documentation on the subject is available in McNair,[3] Smith,[4] Moore,[5] Hackworth,[6] and *Fontes Iuris Gentium*,[7] and there are useful historical discussions of the relevant diplomatic practice in the works, referred to above, of Huber, Keith, Wilkinson, Crandall, Lapradelle–Politis, Kiatibian, Larivière, and Udina. Any attempt at a detailed evaluation of this evidence and the practice to which it relates would require a monograph if not a treatise. It must therefore suffice for our purpose to give a summary estimate of the conclusions which can reasonably be drawn from it. Much of this practice, it should be noted, has no special application to law-making treaties and in evaluating it full allowance has to be made for the fact that a significant proportion of it consists of contentions of interested parties, but even so it is clear that Keith's statement that 'all

[1] *Feldman and Feldman* v. *Polish State Treasury, Annual Digest*, 1919–22, Case No. 44.
[2] *Shehader et Al.* v. *Commissioner of Prisons, Jerusalem, Annual Digest*, 1947, Case No. 16.
[3] McNair, *The Law of Treaties* (1938), pp. 450–74.
[4] Smith, *Great Britain and the Law of Nations*, vol. i (1932), pp. 334–404.
[5] Moore, *A Digest of International Law*, vol. v (1906), pp. 341–56.
[6] Hackworth, *Digest of International Law*, vol. v (1943), pp. 360–77.
[7] Series B, Section I, vol. i, *Digest of the Diplomatic Correspondence of the European States, 1856–1871*, Part I, pp. 583–4; vol. ii, *Digest of the Diplomatic Correspondence of the European States, 1871–1878*, Part I, pp. 591–4.

treaties go by the board'[1] can only be maintained by recognizing a whole series of exceptions and special cases.

It is, for instance, generally recognized that the dissolution of real and, *a fortiori*, personal unions does not terminate treaty obligations. The classical illustrations are those of Sweden–Norway in 1905 and Austria-Hungary in 1919,[2] both cases of real unions, to which may now be added that of Denmark–Iceland in 1944.[3] There is some authority for the proposition, which was applied to the case of Portugal and Brazil by Sir Christopher Robinson in 1827 and applied by the United Kingdom in respect of Denmark and Iceland after 1918, that the dissolution of a unitary state into a personal or real union has no effect on treaty obligations.[4] There is also authority for the proposition that in the dissolution of a union of a federal or confederate character, its treaty obligations remain binding on the constituent parts into which it is dissolved. The best-known case is that of Gran Colombia in 1829.[5] This is little more than the converse of the proposition, for which there is abundant authority in connexion with the formation of the German Empire, that where a state entering a federation retains full power of action over the subject-matter of a treaty its previous treaty obligations are not discharged.[6]

It appears to be clear that the establishment of a protectorate does not in itself affect treaties with the protected state;[7] it would seem to follow that the termination of a protectorate otherwise than by annexation, as for instance by the re-establishment of the independence of the protected state, would not affect treaties of the protected state; if this is so, it is difficult to see why treaties accepted for the protected state and with its authority by the protecting state should be terminated. To explain all these cases as examples of varied types of transmutation of the personality of states which leaves the identity of the contracting party unchanged is at best artificial.

The standard illustration of the clean slate rule is that the United States did not inherit any British treaties; but this proves nothing so far as law-making treaties are concerned since when the United States achieved independence there were no multilateral law-making treaties. In view of the extent to which the case of the United States tends to be treated by many writers as 'the obvious historical example', it is particularly interesting that United States practice has certainly not followed uniformly the clean

[1] *Theory of State Succession* (1907), p. 20.

[2] McNair, *The Law of Treaties* (1938), pp. 421–7.

[3] Mervyn Jones, 'State Succession in the Matter of Treaties', in this *Year Book*, 26 (1947), p. 369.

[4] McNair, op. cit., pp. 418–20, and 433–4.

[5] Ibid., pp. 412–18; Smith, *Great Britain and the Law of Nations*, vol. i (1932), pp. 385–9.

[6] McNair, op. cit., pp. 434–5; Moore, *A Digest of International Law*, vol. v (1906), pp. 354–6; Hackworth, *Digest of International Law*, vol. v (1943), pp. 367–8.

[7] McNair, op. cit., pp. 427–33.

slate rule. Moore[1] cites three cases in which Secretaries of State of the United States have argued in diplomatic correspondence on the assumption that new states are bound by certain treaties of the parent state. The first instance is John Quincy Adams's assertion that Colombia was bound during her War of Independence by the stipulation in the Treaty of 1795 between the United States and Spain that 'free ships make free goods'. This view was followed by Mr. Forsyth in 1839 during the negotiations which preceded the reference to arbitration of the case of the *Mechanic*. In the same period, the United States argued that the 1831 Commercial Treaty between the United States and Mexico was binding upon Texas after she became independent. The Texan Government yielded the point and subsequently availed themselves of their right to denounce the Treaty by giving one year's notice. The value of these expressions of opinion on the part of the United States as an indication of the American view of the law is qualified by more recent events. In 1901 the United States took the position that when Cuba became independent her affairs were withdrawn from the scope of the British treaties with Spain, a view quite inconsistent with that of John Quincy Adams in the case of Colombia.[2] Two years earlier, when Spain gave notice that with the termination of Spanish sovereignty over Cuba the accession of the Cuban telegraphic administration to the International Telegraphic Convention of St. Petersburg of 10 July 1875 must be regarded as cancelled, the United States not being a signatory did not feel called upon to express any opinion upon the validity of this action;[3] this should perhaps be regarded as a case in which the provisions of the Telegraph Convention concerning its application to colonial territories had ceased to be applicable. It is also clear from the discussion in Hackworth[4] of the secession of Panama that these early expressions of an American view would now be regarded as too broad, but as recently as 1929 the United States took the view that an 1830 treaty with the Ottoman Empire was still binding on Egypt.[5] The fact that these early positions require qualification does not mean that they have been or should be completely reversed, and, as we have already seen, the American doctrine of state succession is still derived in part from them.[6]

To these special cases and expressions of United States views may be added certain salient facts in regard to the provisions of general treaty settlements, Commonwealth practice, and the practice of international organizations which appear to furnish a pointer for the future. These we shall now proceed to discuss. When they have all been taken into account

[1] Moore, *A Digest of International Law*, vol. v (1906), Section 773, pp. 341–3.
[2] Ibid., p. 352.
[3] Ibid., p. 351.
[4] *Digest of International Law*, vol. v (1943), pp. 362–3.
[5] Ibid., p. 366.
[6] See Wilkinson, *The American Doctrine of State Succession*, discussed at pp. 115–16 above, and Crandall, discussed at p. 117 above.

the generalization that 'all treaties go by the board' proves to be wholly unwarranted by the evidence of diplomatic practice and an altogether premature crystallization of opinion on a point on which, in view of the uncertainties and inconsistencies of existing practice, the law should still be regarded as fluid.

(*d*) *General treaty settlements*

In a series of important cases provision has been made in general treaty settlements for the continuance of obligations under treaties and other instruments of a legislative character. The significance to be attached to such provisions for the purpose of assessing the position in the absence of such a treaty is clearly debatable. Madison stated the dilemma in terms which have not been bettered during the intervening century and a half:

'Treaties may be considered under several relations to the Law of Nations according to several questions to be decided by them. They may be considered as simply repeating or affirming the General Law; they may be considered as making exceptions to the General Law, which are to be a particular law to the parties themselves; they may be considered as explanatory of the Law of Nations on points where its meaning is otherwise obscure or unsettled, in which case they are first a Law between the parties themselves, and next a General Law, according to the reasonableness of the explanation, and the number and character of the parties to it; lastly, treaties may be regarded as forming a voluntary or positive Law of Nations. Whether the stipulations of a treaty are to be considered as an affirmance, or an exception, or an explanation, may sometimes appear upon the face of the treaty; sometimes being naked stipulations, their character must be determined by resorting to other evidence of the Law of Nations.'[1]

Viewing the matter in this perspective it is impossible to agree with Keith that the great European settlements are 'of no real value as law'.[2] By 'the reasonableness of the explanation, and the number and character of the parties to it', they may well be regarded as clarifying the law on a question on which it is otherwise singularly obscure and unsettled; it will hardly be denied that they are an important element in the growth of custom on the whole subject; as a minimum they are evidence of a practical need for which it has been necessary to make provision by treaty and which should not be ignored by a legal system which is still in an early stage of development.

Belgium, 1831–9.—Thus Belgium was required by the settlement of 1831–9 to accept the public law of Europe as embodied in the Vienna settlement. The protocol of 19 February 1831 states the principle as follows: 'Each nation has its particular rights; but Europe also has its rights conferred by social order. Belgium became independent, found the treaties which govern Europe concluded and in full force. She was bound

[1] *Examination of the British Doctrine* (1806), p. 39.
[2] *Theory of State Succession* (1907), p. 19.

then to respect them and could not lawfully infringe them'. The final settlement embodied in the treaties of 19 April 1839 provided for the application of the provisions of the Final Act of the Congress of Vienna relating to the free navigation of rivers.[1]

Bulgaria, Roumania, and Serbia, 1878.—The Treaty of Berlin provided for the maintenance in the Principality of Bulgaria, which it constituted as an autonomous principality under the sovereignty of the Sultan, of all the conventions and arrangements concluded between Foreign Powers and the Porte. It was in this connexion that Prince Bismarck, speaking as President of the Conference, said without dissent by the other plenipotentiaries that he 'regarded it as in accordance with the law of nations that Bulgaria should remain under the authority of the treaties by which she was bound under the Government of the Porte'.[2] The Treaty also provided that Roumania and Serbia should succeed to certain railway, commercial, and navigation treaties and that the treaty privileges of foreigners should be maintained.[3]

Czechoslovakia and Poland, 1919.—In 1919, treaties between the Principal Allied and Associated Powers and Czechoslovakia[4] and Poland[5] respectively specified the multipartite instruments to be accepted by the new states. The relevant provisions are in the form of undertakings to adhere to a number of multipartite conventions listed, and not in the form of a declaration that these conventions continued in effect; such a declaration, even assuming that it had been envisaged, would presumably have been considered to require the acceptance of other parties to these conventions. Hyde says of these arrangements that they 'did not appear to rest upon or accentuate conditions which international law exacted of the transferees of sovereignty as the price of the acquisition of the territories that came to them but rather to exemplify a policy which the Principal Allied Powers deemed it to be reasonable to apply'.[6] Such a policy nevertheless presupposes the view that the continuance of such obligations is appropriate and desirable.

Finland, 1920.—There was no similar treaty defining the extent of the obligations undertaken by Finland under multipartite instruments, but in 1920, in the Åaland Islands Case, the Council of the League of Nations accepted a report by a Committee of Jurists holding that the convention concerning the Åaland Islands annexed to the Treaty of Peace of 1856

[1] For a full discussion of the Belgian case see Wheaton, *History of the Law of Nations in Europe and America* (1845), pp. 538–55.

[2] For this case see McNair, *The Law of Treaties* (1938), pp. 456–61.

[3] The relevant provisions are summarized in Keith, *Theory of State Succession*, p. 19.

[4] Articles 19, 20, and 21 of the Treaty of 10 September 1919.

[5] Articles 17, 18, 19, and 20 of the Treaty of 28 June 1919.

[6] *International Law chiefly as Interpreted and Applied by the United States*, vol. ii (2nd revised ed., 1945), p. 1541.

created 'true objective law' which Sweden was entitled to rely upon against Finland and which would remain binding upon any state in possession of the Islands.[1] While the treaty in question in this case dealt with the status of a particular territory, the jurists declining to treat the case as one of a servitude, the reasoning which they relied upon would appear to be of potentially wider application.

There has been no general settlement following the Second World War, which would have afforded an opportunity for defining in the same manner the obligations under multipartite instruments of the Asian, Middle Eastern, and African states which have recently attained independence.

(*e*) *British Commonwealth practice.*

Commonwealth practice, while perhaps based in part in the majority of the cases which have arisen (though not in those of Burma, Iraq, and Transjordan) on the continuance of a common Crown, and apparently applicable to treaties in general and not only to instruments of a legislative character, has tended in a similar direction.

Dominion status, 1919.—When the Dominions acquired international status in 1919 they, the United Kingdom, and other countries all accepted the position that they inherited all treaty rights and obligations of any kind which had any possible territorial application to them and not only treaties in which they were specifically mentioned. The relative ease with which this position was so generally accepted was probably largely due to the fact that it represented the culmination of a process of historical development in the course of which the Dominions had been progressively associated with the acceptance and implementation of treaty obligations.[2]

Irish Free State.—The Irish Free State accepted the same position but appears to have considered that it had some option in regard to the extent to which such obligations would continue;[3] its practice in regard to international conventions was not consistent; it regarded itself as bound by the United Kingdom ratification of the Statute of the Permanent Court of International Justice and of the Berne White Phosphorus Convention of 1906 but deposited fresh instruments of ratification of International Labour Conventions ratified by the United Kingdom.[4]

[1] The case is discussed by McNair in this *Year Book*, 6 (1925), at pp. 114–15 and 121–3.

[2] For the historical background see Keith, *Responsible Government in the Dominions*, vol. i (2nd ed., 1928), pp. 840–926; id., *Selected Speeches and Documents on British Colonial Policy, 1763–1917*, vol. ii (1918), pp. 156–66 and 182–9; Noel-Baker, *The Present Juridical Status of the British Dominions in International Law* (1929), pp. 35–63 and 164–203; Stewart, *Treaty Relations of the British Commonwealth of Nations* (1939), pp. 43–201. See also, in regard to the contemporary treaty relations of British non-self-governing territories still at an earlier stage of constitutional development, Fawcett, 'Treaty Relations of British Overseas Territories', in this *Year Book*, 26 (1949), pp. 86–107.

[3] Mervyn Jones, 'State Succession in the Matter of Treaties', in this *Year Book*, 24 (1947), p. 367.

[4] I.L.O. archives.

Iraq.—The United Kingdom–Iraq Treaty of Alliance of 30 June 1930[1] provides that responsibilities in respect of Iraq under international instruments, in so far as they continue at all, devolve upon Iraq and that the parties will take such steps as may be necessary to secure the transference of such responsibilities. This provision must be read in conjunction with the undertaking given by Iraq to the Council of the League of Nations in respect of international agreements and conventions.[2]

Transjordan.—The United Kingdom–Transjordan Treaty of Alliance of 22 March 1946[3] provides that all obligations and responsibilities in respect of Transjordan under any international instrument which is not legally terminated will devolve on Transjordan alone and that the parties will immediately take such steps as may be necessary to secure the transfer of these responsibilities; any general international treaty, convention, or agreement made applicable to Transjordan by the Mandatory is to continue to be observed until Transjordan becomes a separate contracting party thereto or the instrument in question is legally terminated in respect of Transjordan.

Burma, Ceylon, India, and Pakistan.—When Burma was separated from India in 1937 the British Government agreed that Burma was bound to continue to observe and apply all the International Labour Conventions in which she previously participated as part of India.[4] In 1947 the Indian Independence (International Arrangements) Order made provision for the apportionment of international rights and obligations as between India and Pakistan.[5] Membership of all international organizations with all rights and obligations attaching thereto devolved solely upon India; rights and obligations having an exclusive territorial application to India or Pakistan devolved on the Dominion concerned; all other rights and obligations under international agreements devolved upon both Dominions and were to be apportioned if necessary. The Treaty for the recognition of Burmese independence provides that all obligations and responsibilities previously devolving on the Government of the United Kingdom which arose from any valid international instrument should thenceforth, in so far as such instrument might be held to have application to Burma, devolve upon the Provisional Government of Burma.[6] The External Affairs Agreement between the Governments of the United Kingdom and Ceylon contains a similar provision.[7] While doubtless wider in both intention and effect, these arrangements have ensured the uninterrupted participation of

[1] *League of Nations Treaty Series*, vol. 132, p. 366, Article 8.
[2] See p. 137 below.
[3] *United Nations Treaty Series*, vol. 6, p. 146, Article 8.
[4] McNair, *The Law of Treaties*, pp. 467–8.
[5] *Gazette of India Extraordinary*, 14 August 1947.
[6] Cmd. 7360 of 1947.
[7] Cmd. 7257 of 1947.

the Asian members of the Commonwealth and Burma in a wide range of multipartite instruments.[1]

Sudan.—The Self-Government Statute for the Sudan provides that in respect of external affairs the Governor-General of the Sudan shall be directly responsible to the United Kingdom and Egyptian Governments.[2] The question therefore does not arise in respect of the Sudan at the present stage. There is, however, provision in an agreed minute for preparing for the representation of the Sudan in international technical conferences;[3] it will, therefore, presumably arise in due course.

Federal Scheme for Rhodesia and Nyasaland.—The Federal Scheme for Rhodesia and Nyasaland[4] provides that where, immediately before the establishment of the Federation, Her Majesty's Government in the United Kingdom is bound by any written agreement affecting any territory or any rights exercisable therein, being an agreement under which that Government declares that it regards itself as responsible for securing the carrying out of the agreement by the Government for the time being of that territory, then the Government of the Federation will, so far as the matters dealt with in the agreement are within the executive or legislative competence of the Federation, be bound to observe the provisions of that agreement.[5] This section presumably covers both international agreements extended by the United Kingdom to Northern Rhodesia and Nyasaland under colonial application clauses and agreements concluded on behalf of Southern Rhodesia.

Gold Coast.—The Gold Coast (Constitution) Order in Council, 1950,[6] gives the Governor a reserved power to legislate by declaration when expedient in the interests of public order, public faith, or good government (including 'the responsibility of the Gold Coast as a territory within the British Commonwealth of Nations).[7] In these circumstances, the problem does not arise in respect of the Gold Coast at the present stage of constitutional development.

Federation of Malaya.—In the Federation of Malaya the High Commissioner, by section 33 of the Federation of Malaya Order in Council, 1948, and clause 52 of the Federation of Malaya Agreement annexed thereto,[8] has similar reserved powers in respect of the responsibility of the Federation, including foreign relations, and the question therefore does not arise at the present stage of constitutional development.

Federal Scheme for West Indies.—The federal scheme for the proposed

[1] On the India–Pakistan, Burma, and Ceylon cases of 1947 see Mervyn Jones, loc. cit., pp. 369–72.

[2] Article 12 as amended; Cmd. 8767 of 1953, p. 65.

[3] Ibid., p. 67. [4] Cmd. 8754 of 1953. [5] Section 140.

[6] *Statutory Instruments, 1950*, vol. i, No. 2094, pp. 831–62.

[7] Section 58. [8] *Statutory Instruments, 1948*, vol. i, pp. 1244 and 1293.

British Caribbean Federation[1] permits the reservation of bills affecting the obligations of the Federation under any international agreement[2] and legislation by Order in Council for carrying out such obligations;[3] the question therefore does not arise at the present stage of constitutional development.

In all three of these cases it is liable to arise in the course of constitutional discussions now pending.

The evolutionary approach to the problem of self-government has been a characteristic British contribution to the political development of the modern world; the thesis that such evolution need not and should not disrupt or retard the development of international law by means of the law-making treaty represents the application of that approach to one of the crucial problems which beset the growth of an effective technique of international legislation. In these circumstances, it is short-sighted to regard the clear trend of Commonwealth practice as an anomaly to be explained by the special character of the mutual relations of the various parts of the Commonwealth; it is more reasonable to see in it an indication of a general trend in the development of international law.

(*f*) *Practice of international organizations*

There are similar indications in the practice of international organizations. This practice, in its present relatively early stage of development, suggests a distinction between obligations under the constituent instrument of such an organization which are incidental to membership thereof and obligations under other multipartite instruments of a legislative character.

Membership.—It may be regarded as settled by the practice of the League of Nations, the International Labour Organisation, and the United Nations that membership in international organizations and the obligations incidental thereto do not pass to a successor state. The Irish Free State applied for and was admitted to the League of Nations by the ordinary procedure at the Fourth Session of the League Assembly. Iceland was admitted to the International Labour Organisation by the ordinary procedure in 1944 and did not inherit any part of the membership of Denmark, but this is perhaps not a strong case owing to the uncertainties as to the previous status of Iceland.[4] The question came before the United Nations as the result of the partition of India and Pakistan.[5] The Assistant Secretary-General in charge of the Legal Department gave a legal opinion that

[1] *Report of the British Caribbean Standing Closer Association Committee, 1948–1949*, col. no. 255 (1950).

[2] Section 40 (*c*), p. 94.

[3] Section 42 (1) (*b*), p. 95.

[4] Oppenheim's *International Law*, vol i (7th ed., by Lauterpacht, 1948), pp. 163–4.

[5] See Schachter, 'The Development of International Law through the Legal Opinions of the United Nations Secretariat', in this *Year Book*, 25 (1948), pp. 101–9.

India remained an original Member of the United Nations with its previous rights and obligations and that Pakistan became a non-member state, and this opinion, although subsequently criticized in the General Assembly, became the basis of United Nations practice. After discussion, the Legal Committee of the General Assembly agreed that a Member of the United Nations does not cease to be a Member simply because its constitution or its frontier have been subjected to changes and that when a new state is created by separation from a Member of the United Nations it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter. The other international organizations have all taken the same view, which would appear to be correct in principle. The membership of an international organization has a personal quality and it is both reasonable and psychologically sound and wise that a new member of the international community should be required to apply for membership, particularly in the case of the general international organization for the maintenance of peace and security. It is to be hoped that at some stage in the development of international organization admission to membership of the general international organization will take the place of recognition by individual states as the normal method of attaining full international status.[1] If membership is to have this effect it must represent a deliberate act of policy on the part of the general organization. The creation of the mutual obligations involved in the membership of an organization would also appear to call for a deliberate act of policy and organizational problems may arise in connexion with the entry of new members, particularly if there is a substantial increase of membership or the new members are particularly powerful or influential. Similar considerations apply with qualifications to the other international organizations.

Other legislative instruments.—The problems presented by other multipartite instruments of a legislative character are of a different nature and there is not yet an equally clear body of practice concerning them. League of Nations practice affords no clear guidance on the subject.[2]

United Nations practice on the subject does not appear to be governed by any authoritative decision. The Secretariat has wisely been careful to reserve the question of principle. The List of Signatures, Ratifications, Acceptances, Accessions, &c., concerning the Multilateral Conventions and Agreements in respect of which the Secretary-General acts as Depositary

[1] Cf. Lauterpacht, *Recognition in International Law* (1947), pp. 66–69, 'The Collectivisation of the Process of Recognition'.

[2] It is of interest that the only reference to state succession in respect of treaties in the *Répertoire of Questions of General International Law before the League of Nations, 1920–1940*, is to a contention that certain provisions of a boundary treaty between the Ottoman Empire and Persia were not binding on various grounds advanced by Persia in a dispute with Iraq; *League of Nations, Official Journal*, 16th year, No. 2, 1935, p. 120.

contains an introduction by the Secretariat which comments on the problem as follows:

'The changes which have come about in the last few years in the status of a number of States have presented some delicate juridical and technical problems. In conformity with the provisions of some conventions, the contracting parties had extended the application of the conventions to territories for the administration of which they were at that time responsible. Some of these territories, however, have since acquired a status of full and complete independence and have even become Members of the United Nations.

'As the protocols amending former conventions provided that they were open for signature only to the States Parties to those conventions, the question has arisen whether the new States should be regarded as Parties to the conventions in virtue of the undertakings assumed by the Powers which were formerly responsible for their administration.

'Admittedly, the treaties or instruments establishing the independence of a new State usually deal with the problem of that State's succession to international rights and obligations. Nevertheless, it had to be determined whether the new State had to notify the Contracting Parties expressly in writing that it considered itself bound by the conventions covering those rights and obligations.

'Actually, the protocols amending former conventions were signed by the new States to which the conventions were applicable in virtue of declarations made by the Powers which formerly had authority over those territories. In view of the clause limiting to certain States the right to become Parties to the protocols, signature by the new States constituted an implicit acknowledgment *vis-à-vis* the international community that they regarded themselves as still bound by the conventions in question. In some cases, moreover, an express declaration to this effect was made under the signature of the State concerned.'[1]

The International Labour Organisation appears to be the only organization in which a reasonably consistent practice has crystallized in respect of obligations under other multipartite instruments of a legislative character. Pakistan[2] and Burma[3] recognized when accepting the obligations of the Constitution of the International Labour Organisation that the Conventions which had been binding upon them as part of India continued to be binding. Ceylon, as an ex-non-metropolitan territory was in a somewhat different position since the application of International Labour Conventions to non-metropolitan territories is governed by special provisions of the Constitution of the I.L.O. and the legal nature of the obligations assumed in respect of such territories was not fully clarified until the amendment of the Constitution in 1946, but Ceylon's application for membership of the I.L.O. contained an acceptance of the undertakings in regard to the application of International Labour Conventions given on its behalf by the

[1] United Nations Document 1949, V. 9, *Signatures, Ratifications, Acceptances, Accessions, etc., covering the Multilateral Conventions and Agreements in respect of which the Secretary-General Acts as Depositary*, pp. 3–4.

[2] International Labour Conference, Thirty-First Session, *Record of Proceedings*, p. 529.

[3] Ibid., pp. 530–1.

Government of the United Kingdom under Article 35 of the Constitution of the I.L.O. and a promise to give consideration at an early date to the formal ratification of the Conventions covered by such undertakings; a number of these have since been ratified.[1] Indonesia's application was in similar terms[2] but Indonesia subsequently took the view that she continued to be bound by Netherlands ratifications which were applicable to the Netherlands Indies. Viet Nam[3] and Libya[4] also gave undertakings in similar terms. As the International Labour Organisation administers a complex network of some hundred multipartite instruments, it is only natural that it should have been a pioneer in attempting to clarify the position in respect of obligations under such instruments.

In the International Unions for the Protection of Industrial Property and for the Protection of Literary and Artistic Works, the practice has been for new states to deposit fresh ratifications.[5] This practice cannot, however, be regarded as particularly conclusive; the Union conventions are constituent instruments participation in which is the basis of membership of the Union as well as normative instruments; they have each been revised from time to time and some of the fresh accessions by new states, including those of the British Dominions, were effected in the course of the routine acceptance of revised texts; neither Union has had at its disposal any machinery for securing assurances of the continued validity in respect of new states of ratifications by their predecessors; and in at least one case, that of the accession of Czechoslovakia to the Industrial Property Convention in 1919, the accession was regarded as retroactive to the date of creation of the new state.[6] In these circumstances, the practice followed, while clearly fully justified by considerations of prudence and practical convenience, cannot be regarded as having settled the question of how far any obligations would have survived in the absence of fresh ratifications to clarify the position.

The position in respect of the Universal Postal and International Telecommunication Conventions appears to have been similar. The International Telecommunication Union, for instance, was reconstituted after the war in circumstances involving changes of membership the legality of which gave rise to controversy.[7] The independent participation in the Union of the telecommunication administrations of certain non-metro-

[1] International Labour Conference, Thirty-First Session, *Record of Proceedings*, pp. 313–14.
[2] International Labour Conference, Thirty-Third Session, *Record of Proceedings*, pp. 399–400.
[3] International Labour Conference, Thirty-Third Session, *Record of Proceedings*, pp. 402–4.
[4] International Labour Conference, Thirty-Fifth Session, *Record of Proceedings*.
[5] Ladas, *The International Protection of Industrial Property* (1930), pp. 109–10; *The International Protection of Literary and Artistic Property*, vol. i (1938), pp. 115–16.
[6] *Propriété Industrielle*, 1920, pp. 37, 46 ff.
[7] Codding, Jr., *The International Telecommunication Union* (1952), pp. 194–223, 230–1, and 408–19.

politan territories was also a complicating factor. There was similar controversy in the Universal Postal Union.[1] In these circumstances, it is difficult to draw any clear conclusions from I.T.U. and U.P.U. practice.

It will be interesting to see how far other organizations which have continuing responsibilities for important groups of multipartite instruments, notably the World Health Organization, the International Civil Aviation Organization, and the International Maritime Consultative Organization (when it comes into existence) tend to follow I.L.O. practice or the practice of the older public international unions. The problem takes a special form in respect of W.H.O. regulations, which come into force for all Members after due notice has been given of their adoption by the World Health Assembly except for such Members as may notify the Director-General of rejection or reservations within the period stated in the notice.[2] If such regulations cease to be binding on a new state, there would not appear to be any procedure whereby they can again be made binding upon it; confirmation that the regulations remain binding could of course be made a condition of admission to the W.H.O. except in the case of states eligible for automatic admission by virtue of admission to the United Nations.

It appears to be generally accepted that the formation of a supranational community, such as the European Coal and Steel Community, does not in itself affect the treaty obligations of its Members, though it may require them to seek release from certain obligations.[3] It may be hoped that the problem of the effect of the dissolution of such a community on any obligations concluded on behalf of its Members by the community is an academic one.

New states sponsored by international organizations.—It sometimes happens that a new member of the international community is created under the sponsorship of the general international organization. This is particularly apt to happen on the termination of a mandate or trusteeship. There is a precedent in such cases for making provision for the continuance of obligations under multipartite instruments as part of the arrangements for the creation of the new state. Thus, in 1932, Iraq, on the termination of the mandate, gave an undertaking to the Council of the League of Nations that it considered itself bound by all the international agreements and conventions, both general and particular, to which it had become a party, whether by its own action or by that of the Mandatory Power acting

[1] Bureau international de l'Union postale universelle, *Documents du Congrès de Paris, 1947*, vol. ii (1948).

[2] Article 22 of the W.H.O. Constitution.

[3] Concerning the General Agreement concerning Tariffs and Trade see European Coal and Steel Community, *Report of the High Authority on the Situation of the Community*, 10 January 1953, pp. 27–29.

on its behalf.[1] The Plan of Partition with Economic Union for Palestine approved by the General Assembly of the United Nations on 29 November 1947, but subsequently not implemented, provided that the provisional government of each of the proposed states should before independence make to the United Nations a declaration providing that it would be bound by all international agreements, both general and special, to which Palestine had become a party and that any dispute concerning the applicability and continued validity of conventions or treaties signed or adhered to by the Mandatory Power on behalf of Palestine should be referred to the International Court of Justice.[2] The Government of Israel subsequently reached the conclusion that it could be said on the basis of the generally recognized principles of international law that Israel, which was a new international personality, was not automatically bound by the treaties to which Palestine had been a party and that its future treaty relations with foreign powers were to be regulated directly between Israel and the foreign powers concerned. An important factor in reaching this decision was that although Israel had offered to make the Declaration contemplated by the General Assembly, she had not been asked to do so and had been admitted without making such a declaration. A reply by the Government of Israel to a request by the International Law Commission for information on the law of treaties subsequently suggested that a distinction should be drawn between cases of independence which are, from an international law point of view, no more than a change of government and independence which in fact involves the creation of new international personalities.[3] The suggested distinction emphasizes the artificiality of the present position.

In the case of Libya no question of a declaration concerning treaty obligations appears to have been raised during the United Nations proceedings.

The exact interpretation to be placed on this growing body of practice affords scope for considerable debate. Each case presents special features which can be argued to have been decisive, and those who adhere to the traditional view will naturally contend that special arrangements for particular cases would generally have been unnecessary, so far as obligations under multipartite instruments are concerned, if such obligations survived as a matter of law in the absence of such arrangements. But when the law is uncertain, practical men will naturally seek to clarify the position by making special arrangements. For the same reason, the deposit of new ratifications of instruments to eliminate uncertainty is not evidence that no

[1] Article 13; see Hudson, *International Legislation*, vol. vi, p. 46.

[2] United Nations, *Official Records of the Second Session of the General Assembly, Resolutions*, p. 138.

[3] United Nations Document A/CN. 4/19, 23 March 1950, pp. 28, 46 ff.; also reproduced in Briggs, *The Law of Nations* (2nd ed. 1952), pp. 921–3.

obligations would have survived if no fresh instruments had been deposited. The only generalization which can fairly be drawn from the practice reviewed is that it is widely and increasingly recognized that the clean slate rule is, so far as obligations under multipartite instruments of a legislative character are concerned, inconsistent with the evolution of a reasonably orderly and integrated international community.

(*g*) *Views of official and unofficial bodies for the codification of international law*

Some of the draft codes of international law published by legal writers on their individual responsibility contain provisions concerning state succession in respect of treaties, but none of the leading bodies for promoting the codification of international law, official or unofficial, have considered it wise or possible in the present stage of development of the law to formulate any conclusions on the subject. The League of Nations Committee of Experts for the Progressive Codification of International Law limited its consideration of the law of treaties to the procedure for the conclusion and drafting of treaties and accordingly did not deal with this subject, and the International Law Commission of the United Nations has likewise not included it among the aspects of the law of treaties which it has dealt with hitherto.[1]

The Convention on Treaties adopted at the Sixth International Conference of American States at Havana in 1928 on the basis of the preparatory work of the International Commission of American Jurists provides that 'treaties shall continue in effect even though the internal constitution of the contracting States has been modified' and that 'if the organization of the State should be changed in such a manner as to render impossible the execution of treaties, because of division of territory or other like reasons, treaties shall be adapted to the new conditions'.[2] It does not, however, deal specifically with the obligations of new states.

The Institute of International Law has twice discussed the question of state succession in respect of treaty obligations[3] but has not adopted any conclusions on the subject, on which there were divergent views. The International Law Association has not adopted any resolution on the subject and does not appear to have considered the matter. The Harvard Research in International Law deliberately excluded the question from the scope of its draft convention on the law of treaties. This draft includes provisions stating the principle that the obligations of a state under a treaty

[1] See the following documents of the Commission: A/CN. 4/23 of 14 April 1950; A/CN. 4/43 of 10 April 1951; A/CN. 4/54 of 10 April 1952; and A/CN. 4/63 of 24 March 1953.

[2] Article 11. The text of the convention is printed in Hudson, *International Legislation*, vol. iv, pp. 2378–85.

[3] *Annuaire de l'Institut de droit international*, 1 (1931), pp. 185–255, and 1934, pp. 473–89.

are not affected by any change in its governmental organization or its constitutional system[1] and the principle that a change in the territorial domain of a state, whether by addition or loss of territory, does not, in general, deprive the state of rights or relieve it of obligations under a treaty, unless the execution of the treaty becomes impossible as the result of the change.[2] The question of state succession in respect of treaties is, however, expressly reserved by the comment to the draft which specifies that the article on territorial changes does not deal 'with the status of the treaties of a State which ceases to be such in consequence of its annexation to another State, or as a result of its entrance into a union or confederation, or its fusion with another State or States to form a new State, nor with treaties to which a union is a party, when the union is subsequently dissolved into two or more States, nor with the question whether, when a new State is formed out of territory which has been lost by another State in consequence of revolution, secession or other process of dismemberment, it succeeds to the treaty rights and obligations of the dismembered State', and concludes that 'these and other similar cases which might be mentioned involve questions of State succession concerning the rules of which there is no agreement among writers on international law, no uniform jurisprudence and no settled practice'.[3]

The caution shown in approaching the whole subject by all the leading bodies for promoting the codification of international law, official and unofficial, is, when considered in the light of the foregoing appraisal of the state of the authorities, significant supplementary evidence that the law on the matter must still be regarded as fluid.

III. *Conclusions and suggestions*

While the preceding survey of authorities is far from exhaustive, it is submitted that it has clarified the position sufficiently to permit the formulation of a number of conclusions and suggestions on the problem as a whole. They are put forward in the belief that the law is still fluid and that its future development on satisfactory lines is still not beyond the power of an imaginative combination of more thorough theoretical analysis, far-sighted legal craftsmanship in the practice of states and international organizations and, in the last resort, judicial statesmanship.

1. The effect of changes in international status on obligations under multipartite instruments of a legislative character is, except in respect of constituent instruments of international organizations to which special considerations apply, still an open question.

[1] Article 24; *American Journal of International Law*, 29 (1935), Supplement, No. 4: III. The Law of Treaties, Draft Convention with Comment, pp. 1044–55.

[2] Article 26; loc. cit., pp. 1066–77.

[3] Ibid., p. 1076.

2. In respect of constituent instruments of international organizations, the three principles agreed upon by the Legal Committee of the General Assembly in the India–Pakistan case, which correspond to the consistent practice of the League of Nations and the International Labour Organisation, are sound, and should be followed in the future. These principles are:

(*a*) that in general it is in conformity with legal principles to presume that a state which is a Member of the Organization of the United Nations does not cease to be a Member simply because its constitution or its frontier have been subjected to changes, and that it must be shown that the extinction of a state as a legal personality is recognized in the international order before its rights and obligations can be considered thereby to have ceased to exist;

(*b*) that when a new state is created, whatever may be the territory and the population which it comprises and whether or not they formed part of a state Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter;

(*c*) beyond that, each case must be judged according to its merits.[1]

They are equally applicable to all international organizations the membership of which is governed by provisions similar in general character to those of the Charter and the Constitutions of the specialized agencies.

3. In respect of obligations under other multipartite instruments of a legislative character there is a large body of literary opinion against the continuance of such obligations, but a significant number of writers of great weight take the opposite view and what is generally assumed to be the majority opinion is in large measure a survival from an earlier period when the multipartite instrument had not attained its present importance as one of the main instrumentalities for the development of international law on a wide range of subjects; the theoretical basis of this body of opinion over-emphasizes the contractual at the expense of the legislative element in such instruments and many of the writers concerned are clearly conscious of the difficulties of their position; no authoritative judicial decision, international or national, can be invoked to support the view that multipartite instruments of a legislative character should be treated in this respect as on the same footing as other treaties; state practice on the subject is too uncertain and inconsistent to be regarded as having settled the matter but has from time to time disclosed a recognition of the basic problem that the conscious development of international law by legislative effort will be

[1] See Schachter, 'The Development of International Law through the Legal Opinions of the United Nations Secretariat', in this *Year Book*, 25 (1948), pp. 101–9.

seriously prejudiced if new members of the international community are regarded as starting with a clean slate in respect of obligations under legislative instruments.

4. As a matter of legal principle, the rationale of the rule that treaty obligations do not pass to a successor state has no application to obligations under multipartite instruments of a legislative character. Just as treaty provisions creating local obligations are to be regarded as having the character of executed conveyances rather than that of contractual provisions which continue to be executory, so obligations under legislative instruments should be regarded as obligations under the law rather than as contractual obligations. It is generally admitted that a new member of the international community is bound by existing rules of customary international law; now that the rules established by multipartite legislative instruments constitute so large a part of the operative law of nations, a new member of the international community should be in the same position in respect of rules which have a conventional rather than a customary origin.

5. In the case of new members of the international community which have attained self-government by a process of constitutional evolution, the principle that obligations under legislative instruments have not the same personal character as contractual obligations is reinforced by the well-accepted principle that changes in the internal constitutional arrangements of a state do not affect its international obligations. In respect of cases of this type there is now a substantial body of precedent for the continuance of obligations.

6. If acceptance of the obligations of a multipartite instrument of a legislative character has had the effect of vesting rights in individuals or organizations, this is an additional reason for regarding the obligations of the instrument as being of a continuing character. This appears to be the position in respect of International Labour Conventions. While the position is perhaps clearest in cases such as that of the Freedom of Association and Protection of the Right to Organize Convention, 1948,[1] which confers rights on organizations which are entitled to invoke the provisions of the Constitution of the Organization[2] to secure the application of the Convention, the principle would seem to be of general application and it is of interest that it has been the practice of the International Labour Conference to make the acceptance of it a condition for the admission to membership by the Conference of new members of the international community. The same principle would appear to apply to any other instruments which have the effect of vesting rights in individuals or organizations.

[1] *International Labour Code*, 1951, Articles 855–65, 868, and 869.

[2] Articles 23 to 34 of the Constitution of the Organization. Cf. Jenks, 'The Significance for International Law of the Tripartite Character of the International Labour Organisation', in *Transactions of the Grotius Society for 1936*, 22 (1937), pp. 45–81.

7. The existence in a multipartite instrument of a denunciation clause does not affect the principle but, on the contrary, reinforces it. The new member of the international community will have the same rights under the denunciation clause as the other parties to the instrument but does not start without any obligations under the instrument simply because it has, possibly subject to certain limitations, a right of denunciation.

8. The fact that a particular multipartite legislative instrument involves reciprocal obligations among the parties which are in the nature of a complex of bilateral obligations may be an objection to the continuance of obligations of this character, or if these obligations are of a character essential to the continuance of any obligations under the instrument, if participation in the instrument is reserved by its terms to a group of designated parties; it does not constitute an objection if the instrument contains a general accession clause or is open to acceptance by all members of an organization of which the new member of the international community becomes a member.

9. If the principle that obligations under legislative instruments survive is accepted, questions will inevitably arise in regard to its applicability in particular cases. It is a matter for further consideration how far such questions should be regarded as matters for judicial decision, should be settled by recourse to the procedures of the international organization responsible for the instrument, or should be left to be governed by the gradual development of the practice of states. The present discussion of the problem does not aspire to be more than a plea for recognition of the importance of the general principle involved for the future development of international law and the international community, and makes no attempt to resolve all the questions of detailed application which may arise, since these can most usefully be considered on the basis of concrete facts in the light of growing experience.

10. Pending the development into a generally-accepted rule of law resting on satisfactory authority of the principle that there can be no clean slate in respect of instruments of a legislative character, certain practical steps to deal with the problem should be taken as individual cases arise:

(*a*) When a new state comes into being or is recognized on the basis of an international settlement, provision should be made in the treaties constituting the settlement, in accordance with the precedents of 1831–9, 1878, and 1919, for its continued acceptance of the obligations of the appropriate multipartite instruments of a legislative character.

(*b*) When a member of the international community comes into being by a process of constitutional evolution, provision should be made in the constitutional settlement, in accordance with what appears to

have now become the established British practice, for its continued acceptance of the obligations of the appropriate multipartite instruments of a legislative character.

(*c*) When a new member of the international community is admitted to international organizations, its admission should, in accordance with the practice of the International Labour Organisation, be made conditional on its continued acceptance of the obligations of the appropriate multipartite instruments of a legislative character.

(*d*) When a new member of the international community is created on the initiative of the United Nations,[1] the decisions of the General Assembly constituting it as an independent state should embody suitable arrangements for its continued acceptance of the appropriate multipartite instruments of a legislative character.

It cannot be too strongly emphasized that the whole problem must constantly be envisaged in the broadest political perspective in such a manner as to ensure that the psychology of newly-acquired independence and respect for generally-accepted law are reconciled on a basis which contributes to the long-term integration of an effective international community with a law adequate to the economic and social needs arising out of industrialization in a world of economic interdependence. The interests protected by the law and their relative importance vary at different stages in the development of civilization.[2] In an age of revolt against dynastic oppression and alliances and mercantilist economics, and in the succeeding period when uninhibited nationalism and imperial expansion were tempered by *laissez-faire*, the clean slate rule was a natural expression of the claims of unlimited sovereignty and may have represented a reasonable evaluation of the conflicting interests then competing for the protection of the law. In the rough justice of approximations based on average situations from which general rules of law are necessarily derived, it is no longer in the interest of either the older or new members of the international community, or of their citizens, that the emergence of a new member of the community should disrupt the law based on conscious legislative effort the maintenance and development of which is required in the interests of all alike. Political freedom cannot be made real against a background of economic chaos, and to an increasing extent it is the law based on multi-partite instruments which constitutes the basis of international economic life.

[1] As in the cases of Israel and Libya.

[2] Cf. Pound, *An Introduction to the Philosophy of Law* (1922), pp. 59–99; id., *Social Control Through Law* (1942), pp. 63–102.

THE TAXATION OF ALIENS UNDER INTERNATIONAL LAW

By A. R. ALBRECHT, LL.B. (YALE), PH.D. (CANTAB.)

TAXATION usually involves a relation between a state and its own subjects which does not as a rule give rise to questions of international law. When a person leaves his country, however, he becomes liable to taxation by a foreign state. If he owns property in another country or if he engages in some form of economic activity there, he also renders himself liable to foreign taxation. The relation thus established between a state and its alien taxpayer raises a wide range of questions in international law.[1] A fundamental question is that of the right to tax aliens: what is the justification for this right under international law and how has the right developed? Secondly, what is the extent of the right in terms of jurisdiction—who may be taxed and on what may the tax be levied? Thirdly, how is the right to tax aliens limited—otherwise than by rules of jurisdiction—in customary and in conventional international law? Finally, what are the processes for the enforcement of taxes against aliens and what are the remedies available to aliens for the protection of their rights? It is proposed in the present article to treat the first three subjects in this order.[2] The last mentioned must be reserved for separate treatment.

I. THE RIGHT TO TAX ALIENS

A. *Doctrine*

It is a generally accepted principle of international law that the right to tax, which is an aspect of sovereignty, extends to aliens.[3] The doctrine underlying this rule is not only of academic interest but may have a decisive effect in the determination of a particular case.[4] Three main theories have been advanced in this respect: (1) the contractual theory according to which taxation is the payment for goods and services received from the taxing

[1] The question of double taxation will not be treated here since it has already received considerable attention. Reference will be made, however, to the treaties on double taxation whenever they are relevant. For material on the question of double taxation see Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), p. 620.

[2] The following abbreviations will be used in this article: *A.J.I.L.* = *American Journal of International Law*; *Annual Digest* = *Annual Digest of Public International Law Cases*; Hackworth, *Digest* = Hackworth, *Digest of International Law*; *I.T.A.* = *International Tax Agreements*, prepared by the United Nations; *L.N.* = *League of Nations Collection of International Agreements and Internal Legal Provisions for the Prevention of Double Taxation and Fiscal Evasion*; *L.N.T.S.* = *League of Nations Treaty Series*; Moore, *Digest* = Moore, *Digest of International Law*; *U.N.T.S.* = *United Nations Treaty Series*; *Zeitschrift* = *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*.

[3] See Oppenheim, op. cit., pp. 256, 620.

[4] See, for example, *infra*, p. 146, n. 2.

state; (2) the so-called 'ethical' theory which affirms that taxation is a return for advantages received from the state; and (3) the theory of sovereignty according to which taxation is justified solely as an expression of the will of the state, limited by rules of international law.

1. *The contractual theory*

The contractual theory has been stated in its most extreme form by Saredo, an Italian writer who regarded taxation as the result of a bilateral contract between the state and the taxpayer, to be governed by the rules applicable to ordinary contracts.[1] In a more moderate version, the theory is that the right to tax is essentially a contractual one, although perhaps not entirely subject to the same rules which govern ordinary contracts. While this theory is a natural rationalization of taxation, which is in a real sense the price of government, it contains a number of conceptual difficulties which make it unsatisfactory as a legal explanation of the taxation of aliens. It may be argued that a person who voluntarily goes to a foreign country or purchases property or engages in economic activity there may be said to have made an implied agreement with the foreign state to pay its taxes. The case becomes harder when the alien finds himself subject to foreign taxation through no voluntary act of his own, as when he inherits foreign property. To say that he has the alternative of refusing the property and that consequently by accepting it he concludes a contract in which he consents to taxation, is to advance a somewhat strained argument.

In fact, a contract of taxation between the taxpayer and the state is impossible in most cases because there is no real freedom not to contract. The alien taxpayer must pay his taxes whether he has agreed to do so or not. Furthermore, there could be nothing even approaching a bargain between the parties as to the terms of the 'contract': how much the taxpayer must pay and how much he will get in return. The terms are variable at the will of the state, which may alter or abolish existing taxes and introduce new ones, spending the proceeds as it likes without any obligation to consult the alien taxpayer. If the alien believes that a disproportionately small share of the state revenues is devoted to his benefit, he may feel aggrieved, but he has no remedy.[2]

There are two situations, however, in which the right to tax aliens may be affected by a contract. Sometimes a contract exists between the alien

[1] See Saredo, *Traité des Lois* (1871), §§ 779 ff.; Griziotti in *Recueil des Cours*, 13 (1926), p. 31; Lehr in *Revue de Droit International et de Législation Comparée*, 2ième série, 5 (1909), pp. 548 ff. See also the contractual notion in the theory of the taxation of aliens in Grotius, *De Jure Belli ac Pacis*, Liber II, c. ii, § XIV and c. iii, § XIV.

[2] The contractual theory was rejected in *Colorado* v. *Harbeck*, 189 App. Div. N.Y. 865 (1921), wherein the Appellate Division of the State of New York held that the State of Colorado could not maintain a suit for the enforcement of its revenue law upon the ground that the tax was owed as a contractual obligation. See *Columbia Law Review*, 29 (1929), p. 782, n. 32, and p. 784, n. 15.

taxpayer and the taxing state which sets out the nature and the amount of taxation to be allowed. An example of such a contract is the Agreement between the Imperial Government of Persia and the Anglo-Persian Oil Company Ltd. of 29 April 1933.[1] How far a contractual limitation on the right to tax will be binding upon the taxing state is problematical. In the *George W. Cook* case,[2] decided by the United States–Mexican Claims Commission, Cook advanced a claim for $137.70 in Mexican currency on the ground that this sum was illegally collected by the municipal authorities of Guadalajara as a tax on the claimant's property. Cook had been promised by the governor of the state that if he would erect a modern house, the governor would recommend to the state legislature the exemption of his property from the real estate tax. Cook constructed the building and an act was passed granting the exemption. Later, a tax was levied pursuant to a further act of the legislature.

The Commission found that the tax was not a 'real estate tax' within the meaning of the exemption and that the claim would have to be disallowed. However, the report contains the following significant passage:

> 'The right of the State to levy taxes constitutes an inherent part of its sovereignty; it is a function necessary to its very existence and it has often been alleged, not only in Mexico, but in the United States and other countries, that legislatures, whether of states or of the Federation, cannot legally create exemptions which restrict the free exercise of the sovereign power of the State in this regard.'[3]

The Commission then proceeded to qualify this broad statement, drawing a distinction between an exemption granted as a general policy of the state, which is revocable, and an exemption based upon an agreement between the taxpayer and the state to their mutual advantage, which was implied to be irrevocable.[4]

The second situation in which the right to tax aliens may be affected by a contract exists when two or more states have concluded a treaty on the taxation of aliens. Such a treaty does not normally create the right,[5] but restricts it. In this category belong the numerous treaties designed to prevent double taxation, to avoid unfair discrimination, to establish special privileges, and others.

[1] See *League of Nations Official Journal*, (July–December, 1933), Annex 1467, pp. 1653 ff. The Agreement provides that in return for specified payments the Company shall be completely exempt for a period of thirty years from any taxation by national or local authorities on its operations in Persia. Ibid., Article 11, p. 1656. Article 11 (II) provides that 'before the year 1963, the parties shall come to an agreement as to the amounts of the annual payments to be made in consideration of the complete exemption of the Company for its operations in Persia from any taxation of the State and of local authorities, during the second period of thirty years extending until December 31st, 1993'.

[2] See Opinions of the Commissioners, *United States–Mexican Claims Commission*, October–November, 1930, p. 61; also reported in the *Annual Digest*, 1929–30, Case No. 156.

[3] See Opinions of the Commissioners, loc. cit., p. 64.

[4] See ibid., p. 65.

[5] In some cases the treaty may be said to create the right. See, for example, Article 32 of the Economic Agreement of 1920 between Austria and Germany, *L.N.T.S.*, vol. 4, p. 275.

2. *The 'ethical' theory*

A second theory of the right to tax aliens, which may be called the 'ethical' theory, has been propounded in the writings of Griziotti.[1] According to this writer, 'Plus encore que comme un phénomène juridique et politique l'impôt doit être considéré comme une règle générale de caractère éthique.'[2] Consequently, although 'le droit de lever l'impôt a nécessairement son origine et son fondement ou titre juridique dans la souveraineté de l'état',[3] there are limits established by ethical principles and generally recognized in practice which restrict the exercise of the sovereign power.[4] He then names three main factors in the determination of the contribution of the individual to the collective needs of society: '(*a*) les avantages généraux qui résultent du fait d'appartenir à un groupement politique, économique ou social; (*b*) les avantages particuliers qui proviennent de l'activité sociale; (*c*) l'aptitude ou la capacité de l'individu à fournir la contribution requise par la vie collective.'[5]

Considerations of fairness have to some extent influenced the development of rules of international law affecting the right to tax, and it is to be hoped that they will continue to do so in the future. Nevertheless, the right to tax aliens under international law is not at present in fact based upon ethical principles.[6] Moreover, no clear and generally accepted standards of fairness can be said to exist, and attempts to formulate them tend to diverge into metaphysical speculation.[7]

3. *The sovereignty theory*

While the right to tax aliens is sometimes influenced by contracts and occasionally affected by ethical principles, it is justified in international law essentially as an attribute of statehood or sovereignty, limited by international law as will hereafter be defined, and exercised in varying manner according to the policies of the states possessed of it.[8] The sovereignty theory is not rendered inapplicable by the fact that aliens do not recognize the foreign taxing state as their own sovereign, for while

[1] See Griziotti in *Recueil des Cours*, 13 (1926), pp. 5 ff.

[2] See ibid., p. 8. [3] See ibid., p. 18.

[4] See ibid., p. 48, and Isay, *Internationales Finanzrecht* (1934), pp. 47 ff. Compare *Union Refrigerator Transit Co.* v. *Kentucky* (1905), 199 U.S. 194, 202, and *Whitney* v. *I.R.*, [1926] A.C. 37, 54.

[5] See ibid., p. 12. [6] See Allix in *Recueil des Cours*, 61 (1937), p. 557.

[7] Griziotti's principles, for example, seem somewhat contradictory: the rule that the taxpayer should pay according to the advantages which he receives from the state cannot be reconciled with the rule that he should pay according to his capacity, unless it be assumed, rather unrealistically, that capacity is a measure of the advantages received. In this case the former rule is superfluous.

[8] For further discussion of this theory see Griziotti, loc. cit., pp. 25 ff., and citations therein; Allix, loc. cit., pp. 557 ff., and citations therein; Cooley, *The Law of Taxation* (1924), vol. i, pp. 68, 149 ff.; *The Federalist*, No. XXX.

they cannot for this reason be compelled to pay taxes to it on the ground of political allegiance, they may nevertheless become subject to taxation by virtue of the territorial sovereignty of the foreign power whenever they, their property, or their economic activity may be located within its jurisdiction.[1]

B. *Development of the law relating to the taxation of aliens*

1. *Early history*

(*a*) *Disabilities of aliens.* Before the development of the restraints imposed by international law and custom, the taxing power of the state was used to impose severe disabilities upon aliens, fiscal discrimination being one of the chief aspects of the general discrimination against strangers dating from feudal times. During this period aliens had to pay heavy taxes in return for permission to live and carry on business in a foreign country, and they were subject to many special levies. In France, they had to pay a heavy annual 'taxe de chevage' levied on the head of the family[2] plus extraordinary church taxes.[3] The *droit de détraction*, derived from the *droit d'aubaine*, gave the sovereign, as successor of the feudal lords, the right to appropriate the property of aliens who died, either testate or intestate, within the realm, cutting off all heirs, whether citizens or aliens, wherever resident, with the exception of legitimate resident offspring.[4] This right existed in other countries as well and persisted in part even up to the twentieth century.[5]

Sometimes certain groups of aliens like the Lombards and the Jews were singled out for special discrimination.[6] Aliens were subjected to retaliatory taxes during war, notably in the long wars between France and England.[7] In England, as in France, the Jews were burdened with extraordinarily heavy taxes,[8] while other aliens enjoyed varying treatment, occasionally

[1] See *infra*, pp. 152 ff. Several writers have used the concept of 'economic allegiance' to explain the duty to pay taxes which is owed by aliens to the foreign state because of their presence, their possession of property, or their economic activity, within its boundaries. See Seligman, *Double Taxation and International Fiscal Cooperation* (1928); Allix, loc. cit., pp. 553 ff.; Schanz in *Finanzarchiv*, 9 (1892), pp. 365 ff.; 'Introduction', *I.T.A.*, vol. iii, pp. viii and ix. It is doubtful whether the theory really contributes very much towards the clarification of the problem.

[2] The pretext for this tax was that the king used it as a means of knowing all the foreigners in his realm. In fact the king was interested in knowing all the foreigners primarily to collect the tax. See Demangeat, *Histoire de la Condition Civile des Étrangers en France* (1844), pp. 99–101.

[3] See Fiore, *Nouveau Droit International*, vol. ii (1885), p. 112.

[4] See *Nielsen* v. *Johnson* (1929), 279 U.S. 47, 55 ff., and Martens, *Droit des Gens* (Vergé, 1864), Liber III, ch. iii, § 90.

[5] See Cutler in *A.J.I.L.* 27 (1933), p. 225; Allix, loc. cit., pp. 550–1.

[6] See Clamageran, *L'Impôt en France* (1867), pp. 296, 299 ff., 309; *Cambridge Medieval History*, vol. vii (1932), pp. 656 ff.

[7] See Demangeat, *Histoire de la Condition Civile des Étrangers en France* (1844), pp. 105–6.

[8] See Davies, *The English Law Relating to Aliens* (1931), pp. 18, 25.

better,[1] but usually worse[2] than that accorded to English subjects. Aliens in other countries were also subjected to discriminatory taxation.[3]

(*b*) *Privileges of aliens.* As trade and travel increased, states sought, wherever possible, to protect their subjects abroad from unfair discrimination and, often, to obtain fiscal privileges for them despite the legitimate tax rights of foreign states. An early example of this process can be found in the relations of the Western European Powers with the Ottoman Empire. At first, the treaties provided for reciprocal treatment of aliens in the same manner as nationals. Thus Article II of the Treaty of 1535 between France and Turkey stated that

'. . . les dits sujets tributaires des dits Seigneurs pourront respectivement acheter, vendre, changer, conduire et transporter par mer et par terre d'un pays à l'autre, toute sorte de marchandises non prohibées en payant les coutumes et antiques droits de gabelles ordinaires seulement, à savoir le Turc au pays du Roi comme paient les Français, et les dits Français au pays du Grand-Seigneur comme paient les Turcs. . . .'[4]

Gradually, however, France secured more and more fiscal privileges from the relatively weak Turks,[5] and other nations followed suit, obtaining the same or similar privileges[6] or promises of equal treatment by virtue of a most-favoured-nation clause.[7] This process was repeated on an accelerated scale in China[8] and other places.

The fiscal privileges took various forms. Sometimes there was a complete exemption from specified taxes.[9] Treaty provisions contained general prohibitions against the introduction of new kinds of taxation and higher rates,[10]

[1] When the Normans moved into Britain they were freed from the 'scot and lot', the rates and duties ordinarily paid by taxpayers. Separate communities of aliens in English towns continued to enjoy this privilege, much to the chagrin of their English neighbours. See Davies, *The English Law relating to Aliens* (1931), pp. 14, 40–41. Aliens in other countries were sometimes accorded especially good treatment. In some parts of Germany it was formerly the custom not to make foreigners pay taxes on their real estate; see Foulke, *International Law* (1920), vol. ii, p. 24.

[2] Davies, *The English Law Relating to Aliens* (1931), pp. 43–44. See also Lipson, *The Economic History of England* (1947), pp. 530–1.

[3] See *Cambridge Medieval History*, vol. vii (1932), pp. 645 ff.

[4] See Article II of the Treaty of Peace and Alliance between France and Turkey of 1535: *Treaties between Turkey and Foreign Powers, 1535–1855* (1855), p. 170. See also Article III of the Treaty of Commerce between France and Turkey of 1569, ibid., p. 177; Article VII of the Capitulations with France of 1581, ibid., p. 182.

[5] See, e.g. the Capitulations with France of 1604, Articles XII, XIII, XVI, XXII, ibid., pp. 118–90; Treaty of Commerce between France and Turkey of 1838, Articles V and VI, ibid., pp. 235, 236.

[6] See, e.g., the Capitulations with Great Britain of 1675, Articles XIII, XXI, XXIX, XXXII, LIX, LX, ibid., pp. 250, 251, 253, 263; the Treaty of Peace between Great Britain and Turkey of 1809, Article VII, ibid., p. 272; the Treaty of Commerce between Great Britain and Turkey of 1838, Articles I, III, IV and Additional Articles I, II, ibid., pp. 277, 279, 280.

[7] See the Treaty of Commerce between the United States and Turkey of 1830, Article I, ibid., p. 698; Treaty of Commerce between Portugal and Turkey of 1843, Article III, ibid., p. 406.

[8] See the Treaty of Commerce between China and Great Britain of 1902, Article VIII, in Hertslett's *China Treaties* (1908), pp. 74 ff.

[9] See the Capitulations with France of 1673, Articles XI, XXXIV, XXXVI, *Treaties between Turkey and Foreign Powers, 1535–1855* (1855), pp. 196, 197, 198.

[10] See Treaty of Peace and Alliance between France and Turkey of 1535, Article II, ibid., p. 170.

and also stipulated fixed rates for individual taxes[1] and maximum rates for all classes of taxation on certain items.[2] Moreover, the manner in which taxes were collected was made subject to treaty regulation,[3] and some Powers deemed it necessary for the fiscal protection of their subjects abroad to control not only the taxation of aliens in the foreign land, but the taxation of natives as well.[4]

2. *Modern practice*

(*a*) *The development of fiscal rights for aliens.* Eventually the growing intercourse between nations made it necessary to improve the fiscal treatment of aliens and to establish their fiscal rights upon a more stable and uniform basis than special privilege. A body of international law and custom was gradually developed for this purpose.

One of the earliest rules relating to the taxation of aliens was formulated by Grotius, who wrote of the taxation of persons travelling through foreign lands and on the sea that the burdens imposed upon them must be justified by expenses for facilitating the transit.[5] Vattel stated that aliens can be exempt only from those taxes levied upon persons in their quality as citizens, but that they must pay all other taxes on 'tout ce qui a rapport seulement au séjour dans le pays, ou aux affaires qui l'y amènent'.[6] On the other hand, another early writer expressed the view that there was no rule of international law preventing the taxation of aliens more heavily than nationals: 'Le droit des gens rigoureux ne défend pas même d'imposer plus fortement les étrangers que les citoyens.'[7] Nevertheless, this was already a minority view and later commentary upon it revealed how opinion had changed.[8]

Commercial expediency was a prime force in the amelioration of the fiscal treatment of aliens. Alien merchants were among the first to be exempted from the *droit de détraction* and the *droit d'aubaine*, and a series of treaties on commerce led the way towards the elimination of these and other burdensome taxes upon aliens.[9] Besides eliminating specific forms of

[1] See Capitulations with France of 1740, Article X, *Treaties between Turkey and Foreign Powers, 1535–1855* (1855), p. 206.

[2] See the Treaty of Commerce between China and Great Britain of 1902, Article VIII, Hertslett's *China Treaties* (1908), p. 174.

[3] See the Treaty of Commerce between China and Great Britain of 1902, Article VIII, ss. 1, 3, 5, 6, ibid., pp. 175–6.

[4] See the Treaty of Commerce between China and Great Britain of 1902, Article VIII, s. 5, ibid., p. 176.

[5] See Grotius, op. cit., Liber II, c. ii, § XIV, and c. iii, § XIV.

[6] See Vattel, Book II (1758), § 106. See also Suarez, 'On Laws', in *The Classics of International Law*, 2 (1944), pp. 412–13.

[7] See Martens, *Droit des Gens* (Vergé, 1864), Liber III, ch. iii, § 88.

[8] Ibid.

[9] See *Nielsen* v. *Johnson*, 279 U.S. 47, 54 ff. (1929). See also the Treaty of 1875 between Costa Rica and Germany, Article X, and the Treaty of 1891 between Denmark and Germany, noted in Liszt, *Le Droit International*, Gidel's translation (1927), pp. 209–10.

discrimination, treaties also undertook more positive steps to ensure that there would be no further discrimination in the future. This was done chiefly through provisions for most-favoured-nation treatment and national treatment.[1]

(*b*) *The relinquishment of special fiscal privileges for aliens.* More recently, the spread of nationalistic feeling has practically obliterated the former régimes of special tax privileges for aliens which relatively weak Powers had been compelled to concede in earlier years. By degrees, over a long period, the favoured Powers gradually relinquished their special rights. In Egypt, they 'recognised the justice of making their subjects in Egypt liable to the same taxes as the natives' and after many delays finally did so.[2] The capitulations in Turkey were terminated by Article 28 of the Treaty of Lausanne.[3] Furthermore, Article 13 of the Convention on Conditions of Residence, Business, and Jurisdiction between Turkey and the Allied Powers bound Turkey not to 'grant to the nationals of foreign countries any treatment more favourable than that accorded to her own nationals'.[4] A series of treaties with China after the Second World War resulted in the surrender of the special fiscal rights held there.[5] Similar developments have also occurred in other places.

The amelioration of the fiscal treatment of aliens and the abolition of their special privileges in relatively backward countries have been in consonance with the development of a body of international tax law which recognizes the equality of sovereign states in matters of taxation but at the same time recognizes the need for certain minimum standards for the fiscal protection of aliens if there is to be any substantial degree of international intercourse. Today, the taxation of aliens is regulated under international law by a body of rules and practices which may be classified roughly into two groups: the jurisdictional limitations, and the non-jurisdictional limitations. These two classes of rules will now be examined separately.

II. The Jurisdictional Limitations upon the Taxation of Aliens

The inherent right of the state to tax is limited to its jurisdiction, that is, with certain exceptions,[6] to all its subjects and to all persons and things

[1] See *infra*, pp. 176 ff.

[2] See the Declaration of the Powers on Egypt of 17 March 1885, and Cromer, *Modern Egypt* (1908), vol. ii, pp. 435 ff. To some extent the régime of capitulations was supplanted by the most-favoured-nation clause. See, for example, Article 3 of the Treaty of 1921 between Norway and Egypt, *L.N.T.S.*, vol. 5, p. 35.

[3] See ibid., vol. 28, p. 27.

[4] See ibid., p. 163.

[5] See, e.g., Article IV of the Treaty of 1943 between China and the United States, *U.N.T.S.*, vol. 10, p. 271; Article IV of the Treaty of 1943 between Belgium–Luxembourg and China, ibid., vol. 14, p. 387; Article IV of the Treaty of 1944 between Canada and China, ibid., p. 416.

[6] The problem of jurisdictional immunities will not be treated here. Consult, for the jurisdictional immunities from taxation accorded to governments and their instrumentalities, *Bash-*

This period of time and such other facts about the activities and purposes of the alien within the jurisdiction which may be deemed relevant in determining his taxability, are usually discussed in terms of the question whether the alien has established 'domicil' or 'residence' in the taxing state. For convenience the term 'residence' will be used here as expressing the above-mentioned criteria of taxability of aliens.

1. *Residence as a basis for the taxation of aliens*

Most states tax resident aliens, often framing their laws so that residence, rather than citizenship, is the basis of taxation; and little or no distinction is made between subjects and aliens.[1] The practice of taxing resident aliens has repeatedly been recognized as valid under international law by the home state of the aliens involved. In 1844 the Queen's Advocate stated:

'All persons having a fixed residence in a foreign country are liable to the taxation imposed by the supreme power of the State in the same manner and to the same extent as the native subjects unless they can show some special cause of exemption.'[2]

And the United States has taken the same view.[3]

2. *The definition of 'residence' for the taxation of aliens*

Considerable divergencies exist among states regarding the definition of 'residence' for the purpose of taxing aliens. In Great Britain the term has been defined by the courts over a long period of years[4] and designates only one of a number of categories which have significance for income tax purposes.[5] In the United States it has been explained by the Treasury Regulations issued pursuant to the Internal Revenue Act.[6] Moreover, varying concepts of 'residence' and 'domicil' may be used within the same state for different kinds of taxes.[7] No attempt will be made here to analyse the different meanings of 'residence' and other terms in the tax laws of

[1] See the statement of the Assistant Secretary of State of the United States: 'As a general rule, the question of the liability of an alien to payment of income tax depends upon residence rather than citizenship', in Hackworth, *Digest*, vol. iii (1942), p. 575. To the extent that taxation depends upon residence rather than citizenship, the special problem of double taxation created by double nationality is avoided. Nevertheless, treaty provisions designed to meet this problem are not unknown; see, for example, Article 4 (5) of the Treaty of 1948 between Sweden and Switzerland on Succession Duties, *I.T.A.*, vol. ii, 194. The problem of ascertaining 'residence' in such a way as to avoid double taxation still remains.

[2] See Report of 11 November 1844, F.O. 83/2303, in Hwang, *British Practice of Diplomatic Protection of Citizens Abroad* (1948), unpublished dissertation at Cambridge University, p. 39. See also Report of the Law Officers, 30 November 1848, F.O. 83/2381, ibid., p. 41.

[3] See Hackworth, *Digest*, vol. iii (1942), p. 579. Note also ibid., pp. 579–80, and Moore, *Digest* (1906), vol. ii, p. 59.

[4] For the definition of residence for British income tax purposes see Farnsworth, *Income Tax Case Law* (1949), pp. 54–56, 103 ff.

[5] For the others see Konstam's *Income Tax* (1952), §§ 239 ff.

[6] For the definition of residence for United States income tax purposes see Regulations 111, ss. 29.211–12. See further 'The Residence Concept and the Taxation of Foreign Income', in *Columbia Law Review*, 51 (1951), pp. 378–85.

[7] For the effect of residence and domicil on the inheritance tax in Great Britain see Dymond's

to enforce against his person. Such taxes, though enforceable, would be beyond the jurisdiction of the taxing state. If enforced, they would be contrary to international law. Moreover, the term 'jurisdiction' has by frequent usage become intimately associated with certain standards, other than enforceability, for determining the taxability of aliens on the basis of their presence or the presence of their property in a foreign land. These standards, though vague and varying at present, are gradually being defined by the development of customary and conventional international law.[1] They fall into three main categories: taxation based upon the presence of the alien within the jurisdiction, taxation based upon the presence of alien property within the jurisdiction, and taxation based upon the economic activity of the alien within the jurisdiction, each of which will now be examined with regard to the imposition of direct taxes.[2]

A. *Jurisdiction to tax based upon the presence of the alien within the taxing state*

In England, the principle of direct taxation of aliens was first established by a poll tax on the Lombards in the reign of Edward III and applied to all those foreign merchants residing in the country for more than forty days.[3] In the United States, the first direct taxation of aliens by the Federal Government was an income tax which applied to aliens only in so far as they were deemed to be 'residing' in the United States.[4] Widespread practice has sanctioned the custom that in order to be subjected to the poll tax, the income tax, and many other forms of direct taxes,[5] an alien must be present within the jurisdiction of the taxing state for a minimum period of time.[6]

[1] Reference will be made to the treaties for the avoidance of double taxation which have been concluded in recent years, but it will be restricted for the most part to the treaties published in the three volumes on *International Tax Agreements* published by the United Nations. The reader is also referred, generally, to the *Collection of International Agreements for the Prevention of Double Taxation* published by the League of Nations in six volumes (1928–36), and to the 'Report of the Government Experts on Double Taxation' submitted to the Council of the League of Nations on 14 December, 1928, *League of Nations Journal* (1929), pp. 205 ff. See also the Draft Plurilateral Convention for the Prevention of Double Taxation upon Certain Forms of Income: *League of Nations Journal* (July-December, 1931), pp. 2392 ff.

[2] A distinction should be made at the outset of this discussion between direct and indirect taxes. From the moment he sets foot in a foreign land, the alien is subject to indirect taxes which touch almost every aspect of his daily life: food, clothing, lodging, transport, amusement, &c. Similarly, alien property and alien economic activity are burdened with innumerable indirect fiscal obligations. It would be impossible to deal adequately with these taxes within the scope of this article and so the following discussion will be limited for the most part to direct taxes.

[3] See Davies, *The English Law Relating to Aliens* (1931), pp. 213–14, and Lipson, *The Economic History of England* (1947) pp. 530–1.

[4] See Hackworth, *Digest*, vol. iii (1942), p. 578.

[5] Residence has also been used as the basis for the imposition of a residence tax, see *infra*, p. 155.

[6] A transient alien is generally exempt from personal taxes, but there are exceptions in the form of the head tax, sojourn tax, &c. See Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), p. 95, and Allix in *Recueil des Cours*, 61 (1937) p. 564. See, further, *Alaska P. Assn.* v. *Hendenskoy*, 267 F. 154, certiorari denied by the Supreme Court, 254 U.S. 652 (1920); *Haavik* v. *Alaska P. Assn.*, 263 U.S. 510 (1924).

This period of time and such other facts about the activities and purposes of the alien within the jurisdiction which may be deemed relevant in determining his taxability, are usually discussed in terms of the question whether the alien has established 'domicil' or 'residence' in the taxing state. For convenience the term 'residence' will be used here as expressing the above-mentioned criteria of taxability of aliens.

1. *Residence as a basis for the taxation of aliens*

Most states tax resident aliens, often framing their laws so that residence, rather than citizenship, is the basis of taxation; and little or no distinction is made between subjects and aliens.[1] The practice of taxing resident aliens has repeatedly been recognized as valid under international law by the home state of the aliens involved. In 1844 the Queen's Advocate stated:

'All persons having a fixed residence in a foreign country are liable to the taxation imposed by the supreme power of the State in the same manner and to the same extent as the native subjects unless they can show some special cause of exemption.'[2]

And the United States has taken the same view.[3]

2. *The definition of 'residence' for the taxation of aliens*

Considerable divergencies exist among states regarding the definition of 'residence' for the purpose of taxing aliens. In Great Britain the term has been defined by the courts over a long period of years[4] and designates only one of a number of categories which have significance for income tax purposes.[5] In the United States it has been explained by the Treasury Regulations issued pursuant to the Internal Revenue Act.[6] Moreover, varying concepts of 'residence' and 'domicil' may be used within the same state for different kinds of taxes.[7] No attempt will be made here to analyse the different meanings of 'residence' and other terms in the tax laws of

[1] See the statement of the Assistant Secretary of State of the United States: 'As a general rule, the question of the liability of an alien to payment of income tax depends upon residence rather than citizenship', in Hackworth, *Digest*, vol. iii (1942), p. 575. To the extent that taxation depends upon residence rather than citizenship, the special problem of double taxation created by double nationality is avoided. Nevertheless, treaty provisions designed to meet this problem are not unknown; see, for example, Article 4 (5) of the Treaty of 1948 between Sweden and Switzerland on Succession Duties, *I.T.A.*, vol. ii, 194. The problem of ascertaining 'residence' in such a way as to avoid double taxation still remains.

[2] See Report of 11 November 1844, F.O. 83/2303, in Hwang, *British Practice of Diplomatic Protection of Citizens Abroad* (1948), unpublished dissertation at Cambridge University, p. 39. See also Report of the Law Officers, 30 November 1848, F.O. 83/2381, ibid., p. 41.

[3] See Hackworth, *Digest*, vol. iii (1942), p. 579. Note also ibid., pp. 579–80, and Moore, *Digest* (1906), vol. ii, p. 59.

[4] For the definition of residence for British income tax purposes see Farnsworth, *Income Tax Case Law* (1949), pp. 54–56, 103 ff.

[5] For the others see Konstam's *Income Tax* (1952), §§ 239 ff.

[6] For the definition of residence for United States income tax purposes see Regulations 111, ss. 29.211–12. See further 'The Residence Concept and the Taxation of Foreign Income', in *Columbia Law Review*, 51 (1951), pp. 378–85.

[7] For the effect of residence and domicil on the inheritance tax in Great Britain see Dymond's

various nations which determine the precise circumstances in which an alien will be taxed because of his physical presence within the jurisdiction of the taxing state, for such an investigation would require a lengthy digression outside the field of international law.[1] It may be useful, however, to see what light is shed on this problem by some of the cases in international practice and by the growing number of international agreements dealing with this question.

(*a*) *Natural persons.* The criteria for the taxation of alien individuals on the basis of their physical presence within the taxing state have given rise to relatively few cases in international practice. One case establishes that proper jurisdiction requires the alien upon whom the tax is levied, as distinguished from his relatives, to be present within the taxing state.[2] Nevertheless, the same rule may not obtain when the alien taxpayer was once a national of the taxing state and his state does not recognize his expatriation.[3] What is meant by the term 'within the taxing state'? An interesting case on this point, decided by a German court, concluded that the German income tax law extended even to the income of aliens from work performed on German vessels on the high seas.[4]

The criteria for the taxation of aliens upon the basis of their presence within the taxing state have not been greatly clarified by the international agreements which have dealt with the problem. 'Residence'[5] and

Death Duties (1951), pp. 383–5, 466–70. For the definition of 'residence' for the purposes of the estate tax of the United States see Hackworth, *Digest* (1942), vol. iii, pp. 589 ff.

[1] See Allix in *Recueil des Cours*, 61 (1937), pp. 564–75, and Wengler, *Beiträge zum Problem der internationalen Doppelbesteuerung* (1935), pp. 14 ff.

[2] In 1887 the city authorities of Frankfort-on-the-Main in Prussia sought to tax the income of Mr. Honey, an American citizen, on the ground that he had a domicil in Frankfort due to the temporary sojourn there of his wife and daughter, who were living on a monthly allowance which he supplied. Mr. Honey was domiciled and resident in the United States and had never resided in Germany, owned property there, or derived any income from there. Following American protests, the assessment of the taxes was ordered to be discontinued and the amounts paid refunded: Moore, *Digest* (1906), vol. ii, pp. 60–61.

[3] See *Foreign Relations of the United States* (1906), Part II, pp. 1403–5 and 1408 ff. For the case of the attempt by the Jewish congregation at Munich to levy, under their constitution and the laws of Bavaria, a tax for religious purposes upon a citizen of the United States of Jewish descent see Moore, op. cit., p. 55.

[4] Under the German Income Tax Act, the employer was bound to deduct a tax upon the income paid to his employees for work done in Germany, even if the employee was an alien, and to remit the deduction to the tax authorities. The authorities sought to hold a shipowner liable for the deduction from the wages paid to his alien employees for work done on the high seas. It was held that under international law a merchant vessel flying the German flag had to be regarded as German territory even when on the high seas, and therefore that the tax law extended to the income of aliens from work performed on German vessels on the high seas. See *Hanseatlische Rechtzeitschrift* (1930), Part B, p. 659, No. 228, *Annual Digest*, 1929–30, Case No. 46 (*Wages Tax (German Ships) Case*). King James I attempted to impose 'a Tribute of every Tenth Fish' upon English and foreign fishermen alike but was unsuccessful. See Fulton, *Sovereignty of the Sea* (1911), p. 203.

[5] For the provisions of treaties on income and general property taxes, see e.g. Article II (1) (*g*) and (*h*) of the Treaty of 1945 between the United Kingdom and the United States in *I.T.A.* vol. i, p. 118; Article II (1) (*f*) and (*g*) of the Treaty of 1946 between Australia and the United Kingdom, ibid. p. 152.

'domicil'[1] have been defined in the treaties as criteria of taxability and provision made for changes in domicil,[2] for the use of alternative standards where the chosen ones for some reason fail,[3] and for the allocation of taxation between states where there is more than one domicil.[4] Nevertheless, the definitions often refer back to the special and varying meanings attached to the terms in the particular fiscal systems of the contracting states,[5] relatively few attempting to establish an internationally objective standard.[6]

(*b*) *Legal persons*. Like the residence of individuals, the residence of companies is determined by varying standards in different countries and has different tax consequences.[7] Treaty provisions on the 'residence'[8] or 'domicil'[9] of companies for tax purposes often make economic control the decisive factor for the determination of 'fiscal residence' or 'fiscal domicil'.[10] Apart from economic control, the chief criterion for the determination of the taxability of companies upon the basis of their presence within the taxing state is the place of registration or incorporation. Although the right to tax may be allocated upon the basis of registration or incorporation only,[11] registration or incorporation is usually combined with another criterion. Thus an extensive series of exchanges of notes has established a network of international agreements on the taxation of income from air and marine

[1] For the provisions of treaties on income and general property taxes see e.g., Title I of the Treaty of 1946 between France and the United States, *I.T.A.*, vol. i, p. 366, and Article I of the Protocol thereto, ibid., p. 374, and Points 1 and 7 of the Treaty of 1946 between France and the United States, ibid., p. 375.

[2] See Point 12 of Final Protocol of the Treaty of 1935 between Finland and Germany in *I.T.A.*, vol. i, p. 7; Point XI of Final Protocol of the Treaty of 1936 between France and Sweden, ibid., p. 22; addition to Article 9 (2) of Final Protocol of the Treaty of 1950 between Hungary and Sweden, ibid., vol. ii, p. 10.

[3] See, e.g., Article 10 of the Treaty of 1935 between Finland and Germany, ibid., vol. i, p. 5; Article 14 (2) of the Treaty of 1936 between France and Sweden, ibid., p. 17.

[4] See Article 10 (2) of the Treaty of 1935 between Finland and Germany, ibid., p. 5.

[5] For provisions on income and general property taxes see references in n. 6, p. 156, above, and n. 1 above.

[6] See, e.g., Article 10 (1) of the Treaty of 1935 between Finland and Germany in *I.T.A.*, vol. i, p. 5; Article 14 (1) of the Treaty of 1936 between France and Sweden, ibid., p. 17, and Point XII of Protocol to the same Treaty, ibid., p. 22.

[7] In Great Britain a company resides at the place 'where the central management and control actually abides': see *De Beers Consolidated Mines Ltd.* v. *Howe*, [1906] A.C. 455, 458, and, generally, Simon's *Income Tax*, vol. i (1948), §§ 529 ff. For the law in the United States see the Internal Revenue Code, ss. 231 ff., and Regulations 111, ss. 29.231–1 ff. And see *Compañía General de Tabacos de Filipena* v. *Collector of Internal Revenue* (1927), 275 U.S. 87, reported in *Annual Digest*, 1927–8, Case No. 95.

[8] See Article II (1) (*e*) and (*f*) of the Treaty of 1949 between Ireland and the United Kingdom, *I.T.A.*, vol. ii, p. 150.

[9] See Article 10 (4) of the Treaty of 1935 between Finland and Germany, ibid., vol. i, p. 5.

[10] See ibid. See also Article 14 (3) of the Treaty of 1936 between France and Sweden, ibid., p. 17; Article I (4) of the Treaty of 1945 between France and the United Kingdom, ibid., p. 127.

[11] See Article 4 of the Treaty of 1948 between Belgium and the Netherlands, ibid., vol. ii, p. 130, and the Exchange of Notes of 1941 between Panama and the United States, ibid., vol. i, p. 300.

transport which attributes the right to tax companies engaged in this business to the state under whose laws the companies are organized, provided that the head office of the company is also located in the same state[1] or that the ships are documented in the same state.[2]

Suppose that a corporation is registered in one country but owned by citizens of another; what is its identity for tax purposes? The United States has taken the view that American ownership of most of the shares in a corporation incorporated in Germany did not preclude Germany from treating the corporation as German in the assessment of taxes. An American company owned 70 per cent. of the capital stock of a German corporation which was assessed to meet Germany's obligations under the Dawes Plan. The corporation was assessed at the same rate as German companies, rather than as a foreign corporation, and the American owner protested that the corporation should be treated as American. In reply to a request for official intervention, the State Department declared that a state may, incidental to rights as sovereign, impose a tax upon a company incorporated by itself and engaged in business within its territorial limits and that this right is not affected by the alien ownership of shares in the corporation.[3]

3. *The extent of taxation based upon residence*

International law permits the taxation of resident aliens in the same manner as nationals, which means that resident aliens may be taxed upon income from sources outside the foreign taxing state as well as upon their income from within its borders.[4] This view has been supported not only by the practice of taxing states but also by recognition on the part of the state of the alien that taxation by a foreign state of the alien's income from sources outside that foreign state is in accordance with international law.[5] *A fortiori* the income of a resident alien derived from the taxing state but not paid there is taxable by the state from which it is derived.[6] Resident

[1] See Exchanges of Notes between Argentina and other countries in *I.T.A.*, vol. ii, pp. 170–81.

[2] See Exchange of Notes of 1922 between Norway and the United States in ibid., p. 168; Exchange of Notes of 1922 between Sweden and the United States, ibid., pp. 167–8; Exchange of Notes of 1925 between the United Kingdom and the United States, ibid., vol. i, pp. 287–90. See also *infra*, p. 169.

[3] See Hackworth, *Digest*, vol. iii (1942), p. 576. See also the *Reparations Levy Case*, *Zeitschrift* vol. ii (1930), p. 88, *Annual Digest*, 1927–8, Case No. 225.

[4] Note the statements quoted *supra*, p. 153, n. 1. Compare *Wallace Brothers and Co. Ltd.* v. *Commissioner of Income Tax* (1948), *The Law Reports*, Indian Appeals, Bombay, LXXV, pp. 86 ff.

[5] In 1848 the cantonal government of Berne in Switzerland decreed that all resident aliens should, like natives, pay an income tax on income from sources outside as well as within the canton. The Law Officers of the Crown advised the British Government that there could be no legitimate remonstrance against this practice: Report of the Law Officers, 30 November 1848, F.O. 83/2381, Hwang, op. cit., p. 41.

[6] A number of American missionaries in Burma complained that the income tax imposed upon them in Burma was charged not only upon that portion of their salaries paid in Burma but also

aliens are also liable to special or extraordinary taxes which may be levied by the state in which they live so long as they are applied without discrimination.[1] It is doubtful, however, whether this liability would extend to certain forms of taxation, such as forced labour, for which a compensating payment, equivalent to the value of the labour, could be exacted from foreigners.[2]

The right to levy taxes on the basis of residence is confirmed and regulated by a number of international agreements. It is not an uncommon provision in treaties on double taxation that taxes not otherwise specifically allocated should be reserved to the state where the taxpayer resides or is domiciled.[3] In the Treaty of 1926 between Great Britain and the Irish Free State the exclusive taxing power over the taxpayer's entire income was reserved to his country of residence.[4] Other treaty provisions stipulate that the state of residence may include items reserved to the taxing power of the other state for the purpose of calculating the tax base for imposition of the tax.[5]

B. *Jurisdiction to tax based upon the presence of alien property within the taxing state*

1. *Situs as a basis for the taxation of alien property*

The jurisdiction of the state to tax also extends to all property within its territorial limits. To tax the property of aliens is common practice and has been recognized by the states of the aliens taxed as being in accordance with international law. In 1866 when the English Protestant Church of St. Paul in Athens was assessed for the purpose of improving an adjoining street and footway, the British Government was advised by the Law Officers that if the contribution was exacted in accordance with the *lex loci*, there could be no doubt of its validity under international law.[6] The Law Officers also held that there could be no objection to the taxation of foreign property for the purpose of financing a war, when exemption from

upon the portion which was paid directly to their families remaining in the United States. Under the law the tax had to be assessed upon 'income or profits accruing and arising or received in British India' and the Government of India maintained that the income of a missionary residing there accrues or arises there, although it may not be received there. The United States Minister stated that the Indian tax law was no more rigid than the American; see Moore, *Digest* (1906), vol. ii, pp. 61–62.

[1] See ibid., pp. 62–63. See further the *Reparations Levy Case*, cited *supra*, p. 158, n. 3.

[2] See Moore, *Digest* (1906), vol. ii, p. 57.

[3] See *I.T.A.*, vol. iii, p. ix, n. 17.

[4] See ibid., p. ix. The text of the Treaty is reported in *L.N.*, vol. i, p. 56.

[5] See *I.T.A.*, vol. iii, p. ix, n. 18, and Article 13 of the Treaty of 1936 between Hungary and Sweden: ibid., vol. i, p. 11. See also Article XIX (1) of the Treaty of 1948 between the Netherlands and the United States, ibid., p. 244.

[6] See Report of 31 March 1860, F.O. 83/2287, in Hwang, op. cit., p. 43. Two Irish religious institutions in Rome were also held liable to pay local Italian duties. See Report of 8 September 1871, F.O. 83/2297, ibid.

the tax was sought on the ground that it was a war tax.[1] The United States has taken the same view, both with regard to ordinary local taxes[2] and with regard to war taxes.[3]

2. *The situs of tangible property*

The question of the location of property for tax purposes in international law is a complicated and relatively unexplored problem to which only a brief introduction can be given here. The theory is that the taxation of aliens who are not physically present within the jurisdiction of the taxing state must be limited to their property within such jurisdiction.[4] In determining whether the property is located within the jurisdiction of the taxing state, a distinction must first be made between tangible and intangible property. Within the category of tangible property, a further distinction must be made between fixed and movable property.

(*a*) *Immovable property*. There would seem to be little difficulty in determining the situs of immovable tangible property. It is provided in a number of treaties that taxes upon income from such property[5] and taxes upon the capital invested therein, whether general taxes,[6] succession taxes,[7] or extraordinary capital levies,[8] should be limited to the state where the property is situated. A state cannot lawfully tax the real property of an alien in a foreign country.[9]

It may not always be easy, however, to determine what constitutes real property. Problems arise in connexion with valuable rights attached to land in water, gas, oil, timber, crops, &c. Only a small beginning has been made towards a solution of these problems by international agreement.

[1] See Report of 7 January 1847, F.O. 83/2303, Report of 22 June 1859, F.O. 83/2231, Report of 24 December 1866, F.O. 83/2246, and Report of 3 February 1871, F.O. 83/2403: Hwang, op. cit., pp. 44–45.

[2] See Moore, *Digest* (1906), vol. ii, p. 56.

[3] See ibid., pp. 63 ff.

[4] See Hackworth, *Digest*, vol. iii (1942), p. 575; Hyde, *International Law* (1945), vol. i, p. 665.

[5] See Article 2 of the Treaty of 1942 between Hungary and Switzerland, *I.T.A.*, vol. ii, p. 7; Article VI of the Treaty of 1948 between Belgium and the United States, ibid., p. 34; Article IX (1) of the Treaty of 1948 between Denmark and the United States, ibid., vol. i, p. 250; Article VIII of the Treaty of 1948 between the Netherlands and the United Kingdom, ibid., vol. ii, p. 25.

[6] See the following provisions of treaties on income and general property taxes: Article 9 (1) of the Treaty of 1935 between Finland and Germany in *I.T.A.*, vol. i, p. 5; Article 12 (1) of the Treaty of 1936 between France and Sweden, ibid., p. 16.

[7] See Article II of the Treaty of 1944 between Canada and the United States, ibid., p. 343, supplanted by Article II (*a*) of the Treaty of 1950 between Canada and the United States, ibid., vol. ii, p. 210; Article III (2) (*a*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 351.

[8] See Article 1 (*a*) of the Treaty of 1948 between Czechoslovakia and France, ibid., vol. ii, p. 129; Article I (*a*) of the Treaty of 1949 between France and the Netherlands, ibid., p. 132.

[9] When it was believed that the Turkish Government attempted to levy a tax upon the real property in Worcester, Massachusetts, of former Turkish nationals who had become American citizens, the United States objected. See *Foreign Relations of the United States* (1906), Part II, p. 1408.

Some treaties provide that what constitutes immovable property must be determined according to the law of the state where the property whose status is in question is located.[1] Other treaties stipulate that certain property in land should be considered as land for tax purposes, such as income from the cutting of timber,[2] agricultural enterprises,[3] and royalties from the extraction of natural resources.[4] Immovable property may include rights of user[5] and rights secured by immovable property,[6] although the latter rights are usually excluded from the scope of the term,[7] as is income derived therefrom.[8] Income from leasing real property, enjoying it in any other way or alienating it may also be deemed taxable only by the state where the land is situated.[9]

(*b*) *Movable property*. In the case of movable tangible property, the old principle of *mobilia sequuntur personam*, which locates such property at the place of its owner for tax purposes, cannot be regarded either as an established or as a rejected principle of international law, for, as we have seen, the jurisdiction to tax such property belongs to the state in which the property is physically located[10] and the home state or state of residence of the owner of the property.[11]

Treaties on the avoidance of double taxation in respect of succession duties often provide that rights in tangible movable property shall be deemed situated for tax purposes at the place where they were located at the time of the decedent's death or, if *in transitu*, at the place of destination.[12]

[1] See Article 2 (3) of the Treaty of 1942 between Hungary and Switzerland: *I.T.A.*, vol. ii, p. 7; Article 1 (3) of the Treaty of 1941 between Bulgaria and Germany, ibid. p. 189; Article III (2) (*a*) of the Treaty of 1949 between Norway and the United States, ibid., p. 196.

[2] See Point 5 of Final Protocol to Treaty of 1935 between Finland and Germany, ibid., vol. i, p. 7; Point 6 of Final Protocol to Treaty of 1936 between Hungary and Sweden, ibid., p. 12.

[3] See, e.g., Article 2 of the Treaty of 1936 between France and Sweden, ibid., p. 14; Article 2 of the Treaty of 1939 between France and the United States, ibid., p. 90.

[4] See Article VIII of the Treaty of 1948 between the Netherlands and the United Kingdom, ibid., vol. ii, p. 25; Article XII of the Treaty of 1950 between France and the United Kingdom, ibid., p. 118.

For other provisions on the taxation of royalties from the extraction of natural resources see Article IX of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 121; Article X of the Treaty of 1948 between the Netherlands and the United States, ibid., p. 242.

[5] See Article 1 (2) of the Treaty of 1941 between Bulgaria and Germany, ibid., vol. ii, p. 189.

[6] Ibid. See also Article V of the Treaty of 1948 between the Netherlands and the United States, ibid., vol. i, p. 241.

[7] See Article III (2) (*a*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., p. 351.

[8] See Point II of the Final Protocol to the Treaty of 1939 between France and the United States: *I.T.A.*, vol. i, p. 96.

[9] See Point 6 of the Final Protocol to the Treaty of 1936 between Hungary and Sweden, ibid., p. 12; Point II of the Final Protocol to the Treaty of 1935 between France and Sweden, ibid., p. 20; Point 4 of the Final Protocol to the Treaty of 1935 between Finland and Germany, ibid., p. 7.

[10] See *supra*, p. 159.

[11] See *supra*, p. 155. For a discussion of the problem of the taxation of movable property by the American states see Beale, *The Conflict of Laws* (1935), vol. i, pp. 520–1.

[12] See Article III (2) (*b*) of the Treaty of 1948 between the Netherlands and the United King-

There are exceptions, however. Security interests in such property are often excluded from this provision.[1] In an Exchange of Notes between Great Britain and the Netherlands it was provided that property moved from the Netherlands to Great Britain by reason of war and belonging to persons who at the time of their death were considered to be domiciled in the Netherlands under Dutch law would not be treated as situated in Great Britain for the purpose of the succession duty.[2]

Particular difficulties are caused by movable property which is frequently or constantly moving, such as ships, trains, aeroplanes, and vehicles. Special conventions on the taxation of motor vehicles exempt them, at least partly, from taxes by countries other than those where they are registered.[3] The taxation of ships and aeroplanes has been regulated in international agreements according to various criteria which will be discussed later.[4]

3. *The situs of intangible property*

The determination of the situs of intangible property for the purpose of taxation presents additional difficulties. Not only may such property be movable, but it may by its nature be equally well argued to exist in each of several different places at the same time. Under international law a state is free to tax intangible property which it determines is situated within its jurisdiction, regardless of the fact that the same property may be taxable in another state. This was demonstrated in *Winans* v. *The Attorney General*,[5] wherein the House of Lords held that the securities[6] of an American citizen who was domiciled in the United States at the time of his death were liable to the British estate duty because they were physically situate in the United Kingdom.[7] In another case[8] the Supreme Court of the United States held that the intangible property of a British subject represented by securities physically present within the United States[9]

dom in *I.T.A.*, vol. ii, p. 191; Article II (*b*) of the Treaty of 1950 between Canada and the United States, ibid., p. 210.

[1] See, e.g., Article III (2) (*b*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 351; Article III (*b*) of the Treaty of 1946 between Canada and the United Kingdom, ibid., p. 356.

[2] See Exchange of Notes of 1948 between Great Britain and the Netherlands, ibid., vol. ii, p. 193.

[3] See Exchange of Notes of 1938 between Belgium and the United Kingdom, ibid., vol. i, p. 321; Exchange of Notes of 1938 between Belgium and the Netherlands, ibid., p. 323.

[4] See *infra*, p. 169.

[5] [1910] A.C. 27.

[6] The securities were foreign bonds and certificates, payable to bearer, passed by delivery and marketable on the London Stock Exchange.

[7] [1910] A.C. 27, 31. See Simon's *Income Tax*, vol. ii (1949), §§ 565–6.

[8] *Burnet* v. *Brooks* (1933), 288 U.S. 378.

[9] The securities in question consisted of bonds of foreign corporations, bonds of foreign governments, bonds of American corporations and of an American municipality, and stock in a foreign corporation. There was also a cash deposit in a company in New York.

could be subjected to the Federal estate tax.[1] A similar view has been taken in both countries with regard to the income tax on intangible property determined to be located within the jurisdiction of the taxing state.[2]

Since this situation could give rise to serious dangers of double taxation, the situs of intangible property for tax purposes has received special attention in many international agreements for the avoidance of double taxation. The provisions on intangible property in these treaties deal with the problem largely upon an *ad hoc* basis, specifying different criteria of situs for different kinds of intangible property and referring in each case to the application of certain limited kinds of taxes. Furthermore, the criteria for the application of a particular tax to a particular kind of property may vary from one agreement to another. The result is that the body of international law on the subject presents a rather confused and incomplete patchwork of treaty provisions with at least three variable factors: the precise kind of property involved; the particular kind of tax involved; and the particular states involved. The discussion which follows will attempt to summarize the provisions in some of the more recent treaties on debts and credits, securities, patents, copyrights, and other forms of intangible property.

(*a*) *Debts and credits.* Debts, whether secured or unsecured, are usually deemed, for the purpose of succession taxes, to be situated at the place where the debtor resides or, if the debtor is a corporation, where it is organized,[3] although the test of situs may sometimes be domicil.[4] Debts secured by mortgages are often treated differently, however, for the purpose of income and general property taxes[5] and extraordinary capital levies,[6] as well as for succession taxes,[7] being deemed situated where the mortgaged property is located, and income from such property being taxable in the same place.[8] Debts have also been deemed to be located

[1] See, further, Hackworth, *Digest*, vol. iii, pp. 584 ff. For the determination of the situs of intangible property in other countries see Allix in *Recueil des Cours*, 61 (1937), pp. 576–81.

[2] In Great Britain non-resident aliens are liable under the income tax in respect of income arising in Great Britain. See Schedule D of the Income Tax Act and Simon's *Income Tax*, vol. i (cf. p. 162, n. 7) (1948), § 520. In the United States non-resident aliens are liable to taxation upon income derived from sources within the United States. See Hackworth, *Digest*, vol. iii (1942), pp. 582–4.

[3] See Article III (2) (*c*) of the Treaty of 1947 between the Union of South Africa and the United States in *I.T.A.*, vol. i, p. 378; Article III (2) (*c*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., p. 352.

[4] See Article III (*c*) (2) of the Treaty of 1946 between the Union of South Africa and the United Kingdom in ibid., p. 362.

[5] See Article 9 (1) of the Treaty of 1935 between Finland and Germany in ibid., p. 5.

[6] See Article 1 (*d*) of the Treaty of 1948 between Czechoslovakia and France in ibid., vol. ii, p. 129.

[7] See Article IV (2) (*h*) of the Treaty of 1950 between Greece and the United States in ibid., p. 203.

[8] See Article 2 (2) of the Treaty of 1935 between Finland and Germany, ibid., vol. i, p. 3; Article V of the Treaty of 1948 between the Netherlands and the United States, ibid., p. 241.

where the creditor is domiciled[1] and taxes on income therefrom limited to that state.[2]

Special forms of debts and credits may be treated differently. In the Treaty of 1949 between Norway and the United States, promissory notes and bills of exchange are deemed to be situated in accordance with the law of the contracting state imposing the tax on the basis of situs, and if neither state imposes the tax on the basis of situs, they are situated in the state of the decedent's domicil.[3] Article II (*c*) of the Treaty of 1950 between Canada and the United States[4] provides that promissory notes and bills of exchange shall be deemed to be situated where the decedent was resident at the time of his death. On the other hand, Article IV (2) (i) of the Treaty of 1950 between Greece and the United States[5] provides that negotiable promissory notes shall be regarded as situated at the place of residence of the maker and bills of exchange at the place of the drawee's residence.[6] Judgment debts are liable to succession duty where the judgment is reported.[7] Current accounts may be located where the creditor is[8] or where the debtor is.[9] Bank deposits may be located at the domicil of the decedent[10] or at the branch of the bank where the account was kept.[11]

(*b*) *Securities.* For the purposes of succession taxes, securities in the form of corporate stock are usually taxable in the state where the corporation was organized.[12] Income from securities may be taxable where the taxpayer has his domicil,[13] but the taxation of dividends is usually subject to more elaborate provisions.[14] Bonds may be deemed to be taxable in a number of different places under succession duties,[15] distinctions sometimes being made between

[1] See Article 2 (5) of the Treaty of 1942 between Hungary and Switzerland, *I.T.A.*, vol. ii, p. 7.

[2] See Article 8 of the Treaty of 1936 between France and Sweden, ibid., vol. i, p. 16, and Article 4 of the Treaty of 1950 between France and Sweden, ibid., vol. ii, p. 113.

[3] See Article III (2) (*d*) of the Treaty of 1949 between Norway and the United States, ibid., p. 196. [4] Ibid., p. 210. [5] Ibid., p. 203.

[6] Article IV (2) (*g*) also provides that cheques shall be regarded as situated at the residence of the payee. See also Article 3 (2) (*h*) of the Treaty of 1946 between France and the United States, ibid., vol. i, p. 367.

[7] See Article III (2) (*k*) of the Treaty of 1945 between the United Kingdom and the United States in ibid., vol. i, p. 352.

[8] See Article 1 (*d*) of the Treaty of 1948 between Czechoslovakia and France, ibid., vol. ii, p. 129.

[9] See Article 1 (*d*) of the Treaty of 1948 between Belgium and Luxembourg, ibid., p. 131.

[10] See Article IV (2) (*i*) of the Treaty of 1950 between Greece and the United States, ibid., p. 203.

[11] Article III (*d*) of the Treaty of 1946 between Canada and the United Kingdom, ibid., vol. i, p. 357.

[12] See Article III of the Treaty of 1944 between Canada and the United States in ibid., p. 343, replaced by Article II (*f*) of the Treaty of 1950 between Canada and the United States, ibid., vol. ii, p. 210; Article III (2) (*d*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 352; Article III (*f*) of the Treaty of 1946 between Canada and the United Kingdom, ibid., p. 357.

[13] See Article 5 of the Treaty of 1950 between France and Sweden, ibid., vol. ii, p. 113.

[14] See Articles III (5) and VI (2) of the Treaty of 1946 between Canada and the United Kingdom, ibid., vol. i, p. 134.

[15] See Article III (2) (*d*) of the Treaty of 1949 between Norway and the United States in ibid.,

government bonds and corporate bonds,[1] and bearer bonds and registered bonds,[2] while the taxability of income therefrom is determined by still other provisions.[3] The allocation of the taxability of dividends and interest, however, is occasionally subject to the exception that taxes deducted therefrom by withholding at the source will be allowed, whether or not levied by the state in which the income from the securities is deemed to have arisen.[4]

(*c*) *Patents, copyrights, and other forms of intangible property.* Provisions also exist in treaties on succession duties for the taxation of patents at their place of registry[5] and of copyrights and franchises where they are exercisable,[6] and in treaties on income taxes for the taxation of royalties from such patents, franchises and copyrights.[7] Goodwill is localized for succession duties at the place where the business exists,[8] causes of action at the place where they arose,[9] and insurance where the decedent was domiciled[10] or where payable.[11]

C. *Jurisdiction to tax based upon economic activity of aliens within the taxing state*

The two preceding sections have dealt with the jurisdiction to tax aliens based upon the physical presence of the alien or of his property within the

vol. ii, p. 196; Article IV (2) (*i*) of the Treaty of 1950 between Greece and the United States, ibid., p. 203.

[1] See Article III (2) (*c*) and (*d*) of the Treaty of 1948 between the Netherlands and the United Kingdom, ibid., p. 192, and Article II (*e*) and (*f*) of the Treaty of 1950 between Canada and the United States, ibid., p. 210.

[2] See Article III (*e*) of the Treaty of 1946 between Canada and the United Kingdom, ibid., vol. i, p. 357, and Article II (*e*) of the Treaty of 1950 between Canada and the United States, ibid., vol. ii, p. 210.

[3] See Article VII of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 121; Article VIII of the Treaty of 1946 between the Union of South Africa and the United Kingdom, ibid., p. 148.

[4] See, e.g., Article 7 (2) of the Treaty of 1935 between Finland and Germany, ibid., p. 4.

[5] See Article III (2) (*f*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 352; Article III (*k*) of the Treaty of 1946 between Canada and the United Kingdom, ibid., p. 357.

[6] See Article III (2) (*i*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., p. 352; Article III (1) of the Treaty of 1946 between Canada and the United Kingdom, ibid., p. 357.

[7] See, e.g., Article 7 of the Treaty of 1939 between France and the United States, ibid., p. 91, and Point (1) in the Exchange of Notes of 1946 between France and the United States, ibid., vol. ii, p. 19; Article VIII of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 121.

[8] See Article III (2) (*g*) of the Treaty of 1948 between the Netherlands and the United Kingdom, ibid., vol. ii, p. 192.

[9] See Article III (2) (*j*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 352.

[10] See Article III (2) (*e*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., p. 352.

[11] See Article III (*g*) of the Treaty of 1946 between Canada and the United Kingdom, ibid., p. 357; Article II (*g*) of the Treaty of 1950 between Canada and the United States, ibid., vol. ii, p. 210.

taxing state. At least one of these two factors is essential to the jurisdiction to tax aliens. Another category of jurisdictional questions arises, however, not conveniently classifiable in either of these two groups, which relates to taxation based upon the exercise of some form of economic activity within the jurisdiction of the taxing state. This type of taxation finds its ultimate jurisdictional basis upon one or both of the grounds already mentioned, since the economic activity may be sufficient in the law of the taxing state to constitute a form of residence and it may in one way or another be conjoined with the possession or use of property. Although economic activity therefore does not constitute an independent basis for jurisdiction, it nevertheless raises jurisdictional questions which merit separate attention.

Taxation of the economic activity of aliens may take many forms, but the most common is the income tax. In Great Britain the tax is levied upon non-residents in the name of any factorship, agency, receivership, branch or management[1] for trade exercised within the United Kingdom.[2] In the United States the tax is levied upon all the income of non-resident aliens from sources within the United States according to one of several categories established by the law.[3] Other countries impose taxes upon production, distribution, business transactions, and other forms of economic activity.[4] There can be little doubt that such taxation is in accordance with international law as a valid exercise of the sovereign power to tax within the jurisdiction of the taxing state. Taxes of this type, however, have been limited to a considerable degree by a network of international agreements upon double taxation, whose provisions will now be discussed.

1. *Personal services*

The income derived by an alien for personal and professional services is ordinarily taxable where the services were rendered and where the alien is resident, the two not necessarily being the same place. A number of treaties provide that residents of one country shall be exempt in the other from taxes upon compensation for personal and professional services performed in the latter country provided that they are not present in the latter country for more than 183 days of the taxable year in the aggregate and provided that the services are performed for a person who is resident in the

[1] See Simon's *Income Tax*, vol. ii (1949), §§ 14, 56 ff.

[2] See ibid., §§ 46 ff. Non-resident aliens may also be held liable under the British income tax in other ways. See *McMillan* v. *Guest*, [1942] A.C. 561, in which it was held that the non-resident alien director of an English company who was resident in the United Kingdom held a 'public office within the United Kingdom' and was thus liable to be charged to income tax in respect of the profits of his office under Schedule E of the Income Tax Act.

[3] See ss. 211–19, 230–6 of the Internal Revenue Code of the United States and Regulations 111, ss. 29.211–29.219, 29.230–29.236. See also Hackworth, *Digest*, vol. iii (1942), pp. 584–9.

[4] See Allix in *Recueil des Cours*, 61 (1937), pp. 582 ff.

former country.[1] It is often added that such exemption shall not apply to the 'profits or remuneration of public entertainers such as stage, motion picture or radio artists, musicians and athletes'[2] nor where the compensation is not taxed by the other country.[3] Other treaties establish somewhat different standards for similar exemptions.[4]

A second group of treaty provisions limits the taxability of income from personal and professional services to the state where the activity was exercised,[5] provision being made for the ascertainment of that place.[6] The fees of members of a board of directors may be taxable in the state where the management is located,[7] or where the activity for which payment is made takes place.[8]

Special provisions exist for the taxation of payments which are made by the governments of the contracting states for services performed in the discharge of governmental functions. Some treaties allow them to be taxed only where they are payable.[9] Exemptions may also be based upon nationality. Article X of the Treaty of 1945 between the United Kingdom and the United States provides reciprocally that any such payment by either country shall be exempt from taxation by the other except when received by a subject of the latter state who is not also a subject of the former.[10] Other treaties establish a test of residence. The Treaty of 1946 between Canada and the United Kingdom provides that payments by one state for services rendered in the discharge of governmental functions shall be exempt from taxation in the territory of the other if the recipient is not ordinarily resident there or is resident there solely for the purpose of rendering the services.[11] Similar provisions exist in other treaties.[12] Finally, some treaties establish a very broad exemption from taxation of

[1] See Article XI of the Treaty of 1945 between the United Kingdom and the United States in *I.T.A.*, vol. i, p. 122.

[2] See Article IX of the Treaty of 1946 between Australia and the United Kingdom, ibid., p. 156.

[3] Ibid.

[4] See Article XI of the Treaty of 1948 between Denmark and the United States, ibid., p. 251.

[5] See Article 5 (1) of the Treaty of 1935 between Finland and Germany, ibid., p. 4, and Point 10 of the Final Protocol of the same Treaty, at p. 7.

[6] See Article 5 (2) of the Treaty of 1935 between Finland and Germany, ibid., p. 4, and Point 9 of the Final Protocol to the same Treaty, at p. 7; Article 7 of the Treaty of 1936 between Hungary and Sweden, ibid., p. 10; Article 6 (2) of the Treaty of 1936 between France and Sweden, ibid., p. 15.

[7] See Article 5 (3) of the Treaty of 1935 between Finland and Germany, ibid., p. 4. See also Article 10 of the Treaty of 1936 between France and Sweden, ibid., p. 16.

[8] See Article 9 of the Treaty of 1936 between Hungary and Sweden, ibid., p. 10. See also Article I (*j*) of the Treaty of 1950 between Canada and the United States, ibid., vol. ii, p. 104.

[9] See Article 7 of the Treaty of 1936 between France and Sweden, ibid., vol. i, p. 16.

[10] See ibid., p. 122. The provision does not apply to payments for services rendered in connexion with any trade or business carried on by the contracting parties for profit.

[11] See Article VIII, ibid., p. 135.

[12] See Article VIII of the Treaty of 1946 between Australia and the United Kingdom in ibid., p. 156.

all compensation paid by either state to individuals residing in the other contracting state without the usual exception for services rendered in connexion with any trade or business carried on for profit.[1]

2. *Industrial and commercial enterprises*

International agreements regulating the taxation of industrial and commercial enterprises usually provide that the income of such businesses shall not be taxable unless they are engaged in trade or business in the taxing state through a permanent establishment situated therein and that, if a business is so engaged, then it is liable to taxation upon the whole of its income arising within the taxing state.[2] Exceptions are sometimes made in the case of certain kinds of enterprises[3] or to save special provisions of fiscal law.[4] A number of these treaties provide that taxes upon the capital in such enterprises shall be levied only where the income therefrom is taxable,[5] but most of the treaties are silent on this point.

Since the words 'permanent establishment' are crucial for the determination of the taxability of an enterprise, they are usually defined at some length, and in many treaties in substantially the same way.[6] Allocation of income prevents double taxation in case of the existence of establishments in more than one state.[7] In determining industrial and commercial profits no profit is deemed to have arisen from certain purchases and sales of goods within the territory of the taxing state.[8] To avoid tax evasion by manipulation of income where an enterprise in one state controls an enterprise in the other and dealing does not take place at arm's length, it is usually provided that an adjustment may be made in reported income or that there will be attributed to the establishment the income which it might be expected to have derived if it were an independent enterprise engaged in the same

[1] See Article XV of the Treaty of 1948 between the Netherlands and the United States, *I.T.A.*, vol. i, p. 243, which does not even contain the requirement of residence.

[2] See Article III of the Treaty of 1945 between the United Kingdom and the United States in ibid., p. 119.

[3] See Article III of Treaty of 1948 between New Zealand and the United States, ibid., p. 232.

[4] See Article III of the Treaty of 1945 between the United Kingdom and the United States, ibid., p. 119.

[5] See Point 1 of the Protocol to the Treaty of 1946 between France and the United States, ibid., p. 374.

[6] See Point 3 (*f*) of the Protocol to the Treaty of 1942 between Canada and the United States, ibid., p. 110, and Article I (*o*) and (*r*) of the Treaty of 1950 between Canada and the United States, ibid., vol. ii, p. 104; Article II (1) (*l*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 119.

[7] See Article III (1) of the Treaty of 1942 between Canada and the United States, ibid., p. 104, and Article 1 (*b*) of the Treaty of 1950 between Canada and the United States, ibid., vol. ii, p. 102; Article III (3) of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 120.

[8] See, e.g., Article I of the Treaty of 1942 between Canada and the United States, ibid., p. 104; Article III (4) of the Treaty of 1945 between the United Kingdom and the United States, ibid., p. 120.

activities under the same conditions.[1] Special provision is made for agents of enterprises of one country operating in the other.[2]

3. *Transport enterprises*

The taxation of income from shipping and air transport may be determined by several different criteria or various combinations of them. The taxation may be limited to the state where the management of the enterprise is located,[3] sometimes with the proviso that the ships or aircraft must also have the nationality of the same state, or fly its flag,[4] or be constituted there.[5] The place of documentation of the ships or registration of the aircraft may be given the sole right to tax,[6] often provided that the company which owns them is also registered or incorporated there.[7] Or the right may be given to the state where the operator of the business resides,[8] sometimes with the proviso that the ship or aircraft be registered in the same state.[9] Thus there is as little uniformity in the determination of the taxability of transport enterprises as of the other kinds of economic activity which have been discussed.

III. Other Limitations upon the Taxation of Aliens in Customary and Conventional International Law

1. CUSTOMARY INTERNATIONAL LAW

Besides jurisdictional limitations, international law imposes further limitations upon the taxation of aliens and their property. These limitations

[1] See, e.g., Article IV of the Treaty of 1945 between the United Kingdom and the United States, *I.T.A.*, vol. i, p. 120; Articles III (3) and IV of the Treaty of 1946 between Australia and the United Kingdom, ibid., p. 154; Articles VI (2) and VII of the Treaty of 1946 between the Union of South Africa and the United States, ibid., p. 162; Articles IV and V of the Treaty of 1948 between Belgium and the United States, ibid., vol. ii, pp. 33, 34; Articles III (3) and V of the Treaty of 1950 between France and the United Kingdom, ibid., p. 117. See also Carroll in *A.J.I.L.* 29 (1935), pp. 588 ff.

[2] See above, p. 168, n. 6, and the treaties on the taxation of profits arising through an agency: *I.T.A.*, vol. i, pp. 261 ff. See also Articles 1–4 of the Treaty of 1942 between New Zealand and the United Kingdom, ibid., vol. ii, pp. 148–9; Article 3 of the Treaty of 1945 between France and the United Kingdom, ibid., vol. i, p. 128.

[3] See the Exchange of Notes of 1938 between Denmark and the Netherlands on the taxation of income from air transport enterprises, ibid., p. 281.

[4] See Article 5 of the Treaty of 1936 between France and Sweden in ibid., p. 15, and Point V of the Final Protocol to the same Treaty, at p. 21.

[5] See Article 1 of the Treaty of 1934 between Greece and Yugoslavia, ibid., p. 294, and the Exchange of Notes of 1949 between Argentina and Belgium, ibid., vol. ii, p. 170.

[6] See Article V of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 120. The place of registry or documentation is frequently given the sole right to tax under succession duty agreements. See Article III (2) (*f*) of the Treaty of 1945 between the United Kingdom and the United States, ibid., p. 352.

[7] See *supra*, p. 162. See also the Exchange of Notes of 1941 between Panama and the United States, ibid., pp. 300–2.

[8] See Article V of the Treaty of 1946 between Canada and the United Kingdom, ibid., p. 134.

[9] See Article V of the Treaty of 1946 between Australia and the United Kingdom, ibid., p. 155.

are to be found in both customary and conventional international law. Customary international law deals for the most part with the problem of discrimination. An additional problem is that of confiscatory taxation.

A. *Discrimination*

Fair and reasonable discrimination between aliens and nationals is in accordance with international law. Discrimination of some kind is almost inevitable. For example, aliens are usually taxed without representation but have no legitimate complaint on this account under international law. Discrimination may also be necessary for administrative reasons[1] or it may be justified by particular circumstances.[2] Even when discrimination is not easily justifiable, it cannot be said with certainty that for this reason it automatically contravenes customary international law,[3] for the practice of states in this matter is not consistent. Non-resident aliens in Great Britain, for example, are not entitled to any personal allowances in the taxation of their property in the United Kingdom, although personal allowances are granted to non-resident British subjects in proportion to the relation which their total income liable to the United Kingdom tax bears to their total income from all sources.[4] The tax laws of the United States have at times discriminated against foreign businesses, particularly insurance companies,[5] and the federal tax law at one time provided for retaliatory discrimination against the citizens or corporations of states practising fiscal discrimination against the United States.[6] In upholding the legality of a legacy law of

[1] See, e.g., the Belgian reply to the Anglo-American protest against the refusal of Belgian fiscal authorities to allow foreign companies with branches in Belgium to deduct from their Belgian profits for tax purposes the expenses incurred outside Belgium for the administration of Belgian branches. The Anglo-American Chamber of Commerce complained that while Belgian companies could deduct all expenses, including those incurred outside Belgium, foreign companies were limited to the expenses incurred in Belgium. The Belgian Minister of Finance replied that the reason for the distinction was that it would be administratively impossible for Belgian authorities to determine the accuracy of the expenses of foreign companies incurred outside of Belgium for the administration of Belgian branches, and thus to permit such deductions would open the way to abuses. The Minister further pointed out that the amount involved was very slight. The American Minister to Belgium, in reporting to the United States Secretary of State, stated that the reply of the Belgian Minister of Finance was 'convincing and conclusive': see *Foreign Relations of the United States* (1906), Part I, pp. 71–72.

[2] See *In re Kotta* (1921), 187 California 27, reported in the *Annual Digest*, 1919–22, Case No. 167, p. 240, where the justifiability of discrimination was determined by the test whether the difference in treatment bears a reasonable relation to the object of the tax.

[3] See Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 95. See also Martens, *Le Droit des Gens* (Vergé, 1864), Liber III, ch. iii, § 88.

[4] See Simon's *Income Tax*, vol. i (1948), § 548.

[5] See Borchard, *Diplomatic Protection of Citizens Abroad* (1915), p. 96; *Foreign Relations of the United States* (1899), pp. 345–8; Kingsbury in *Proceedings of the American Society of International Law* (1911), pp. 215–18; Cooley, *The Law of Taxation* (1924), vol. iv, p. 3464; Hyde, *International Law* (1945), vol. i, p. 664. Discrimination against alien corporations in favour of domestic ones may also take the form of a fee rather than a tax; see Hackworth, *Digest*, vol. iii (1942), pp. 708 ff.

[6] See s. 103 of the United States Revenue Act of 1934. See also Carroll in *A.J.I.L.* 29 (1935), p. 592.

Louisiana imposing a discriminatory 10 per cent. tax upon legacies to persons who were neither citizens of the United States nor domiciled in Louisiana, the Supreme Court of the United States sanctioned discrimination in the absence of a treaty obligation prohibiting it.[1]

On the other hand, the existence of unfair discrimination against aliens in taxation has frequently been held to invalidate a fiscal exaction under customary international practice.[2] According to the well-known formulation of the United States Secretary of State Fish, a tax on aliens can afford no ground for diplomatic protest 'so long as the tax is uniform in its operation and can fairly be deemed a tax and not a confiscation or unfair imposition'.[3] Thus, if the tax is loosely or unfairly assessed or if unjustified exemptions are accorded to some taxpayers, increasing the burden on others, there may be ground for complaint.[4] The uniformity of the exaction may be required to extend to all foreigners.[5] A tax may be objectionable if it has been arbitrarily assessed upon a particular person or constitutes a special exaction not generally regarded as a tax.[6] Moreover, special exactions from particular persons which might be necessary in time of war may be regarded under customary international law as unjustified in time of peace.[7]

International practice thus affords precedent for the view that unfair fiscal discrimination against aliens is invalid under customary international law. Nevertheless, recent practice is too contradictory to permit the definite conclusion that this view is a clearly established rule.[8]

B. *Confiscation*

It is frequently stated as a rule of international law that taxes upon aliens must not be confiscatory,[9] and it is clear from numerous instances in diplomatic practice, of which some will be examined presently, that this restriction upon the taxation of aliens is independent of the question of discriminatory taxation. Nevertheless, doubts also arise as to the state of

[1] See *Mager* v. *Grima* (1850), 8 Howard 490, 493–4; *Prevost* v. *Greenaux* (1857), 19 Howard 1.

[2] See the statement in Moore, *Digest* (1906), vol. ii, p. 57. See also ibid., pp. 59 and 63, and vol. iv, p. 23; Hackworth, *Digest*, vol. iii (1942), p. 576.

[3] Moore, *Digest* (1906), vol. ii, p. 59, and vol. iv, p. 23.

[4] See ibid., vol. ii, p. 65. See also *Foreign Relations of the United States* (1911), pp. 72 ff.

[5] See Hackworth, *Digest*, vol. i (1940), p. 141. On occasion the entire foreign diplomatic corps in a particular country will act as one in order to avoid discrimination against some of them. See, e.g., the diplomatic correspondence relating to the enforcement of the Haitian Tax Law of 1876, *Foreign Relations of the United States* (1907), Part II, p. 728.

[6] See the note of the United States Secretary of State to the American Minister to Spain, in Moore, *Digest* (1906), vol. ii, p. 65.

[7] See ibid., vol. iv, pp. 20–21; see also vol. ii, p. 59.

[8] Note that the principle of non-discrimination failed to secure approval at the Paris Conference of 1928 on the Treatment of Foreigners. See *infra*, p. 184.

[9] Other terms, such as 'unfair' and 'excessive', are also used, but for convenience the word 'confiscatory' will here be understood to include them all. See Moore, *Digest* (1906), vol. ii, pp. 52, 65; vol. iv, p. 23.

customary international law in the matter of confiscatory taxation, for authoritative pronouncements on the subject have not been without confusion and contradiction. Furthermore, the rule is difficult to define, since it involves standards so indeterminate that they may be invoked in widely varying types of situations. The following discussion will, first, cover the question whether there is a principle of international law prohibiting the confiscatory taxation of aliens and, secondly, examine the types of situations in which it has been sought to apply that principle.

1. *Confiscatory taxation in customary international law*

One source of doubt concerning the validity in international law of the principle that an alien may not be subjected to confiscatory taxation stems from the view that an alien is bound under international law to pay the taxes levied upon him so long as there is no discrimination against him. In 1913, during the Mexican Revolution, the Governor of the State of Sinaloa levied a five per cent. tax on all property in the State under penalty of confiscation, a measure regarded as confiscatory. Great Britain and Germany took the position that under international law their subjects in Mexico were expected to pay the same taxes levied on Mexicans even though extraordinary or seemingly unjustifiable.[1]

The question also involves the sovereign right of the state to tax. When the United States protested to Mexico about the confiscatory mining taxes imposed by the Mexican Government to the detriment of American citizens in Mexico, Mexico replied that 'the subject matter of the representations lies exclusively within the province of the Mexican authorities and that, under the principles of international law there is no ground whatever for its being discussed through the diplomatic channel'.[2] The American Secretary of State then declared that the United States had never questioned Mexico's right to impose taxes in accordance with the Mexican Constitution, but protested 'against a system of taxation having for its avowed object . . . the absolute confiscation of the larger holdings of mining claims in Mexico, in which so many American citizens are interested'.[3]

According to the doctrine of the sovereign right of taxation, and in the absence of special treaty provisions, there would seem to be no basis in international law for objections to the exercise by a state of its right to tax where there is no discrimination against aliens. As a general rule, this must be admitted. Nevertheless, an exception must be made in the case of con-

[1] See *Foreign Relations of the United States* (1914), p. 766. Note also the Reports of the Law Officers: January 7, 1847, F.O. 83/2303; June 22, 1859, F.O. 83/2231; December 24, 1866, F.O. 83/2246; February 3, 1871, F.O. 83/2403 (from Hwang, *British Practice of Diplomatic Protection of Subjects Abroad* (1948), unpublished manuscript at Cambridge University, pp. 44–45), and a decision of the German *Reichsfinanzhof* of 1928, *Zeitschrift*, vol. ii (1930), part 2, p. 88.

[2] See *Foreign Relations of the United States* (1917), p. 1039.

[3] See ibid., pp. 1040–1.

fiscatory taxation, for it is a rule of international law that confiscation, or expropriation without compensation, is illegal.[1] There is little difference in the practical effects of confiscation and confiscatory taxation. Surely, then, confiscation in the guise of taxation cannot be permitted when confiscation itself is prohibited. A state may tax aliens without unfair discrimination under international law only so long as the taxation is not confiscatory. When taxation becomes confiscatory, it becomes illegal.[2]

2. *The application of the rule against confiscatory taxation*

Any attempt to distinguish between legitimate and confiscatory taxation first requires a distinction between taxation proper and confiscation. As one writer has pointed out, taxation and confiscation find much the same theoretical justification under the doctrine of sovereignty.[3] The practical difference between the two is not easily definable. Taxation, it has been said, usually results in taking only a portion of property, while confiscation results in the taking of all or most of it; taxation is usually indirect and confiscation is usually direct.[4] These distinctions, however, are not always helpful.

The difference is pre-eminently one of degree, for taxation is, in a sense, a partial confiscation, and confiscation, like taxation, is a governmental requisition upon subjects for the needs of the state.[5] The essential characteristic of confiscatory taxation is simply that, on the face of it, it takes too much from the taxpayer, but the ascertainment of what is too much depends upon such an indeterminate combination of diverse and varying factors that it is impossible to select one of them and say with any certainty that it constitutes confiscation. In these circumstances definition must be forsaken for illustration and each point analysed upon the assumption that only in conjunction with other factors can it be said to indicate confiscatory taxation.

In view of the vast and growing fiscal requirements of the modern state and the levelling tendency of national tax policies in recent decades,[6] particular caution is required in delimiting the bounds of confiscatory taxation, for the rule of international law prohibiting it is meant primarily to protect aliens against unfair treatment and not to create a special class of privileged persons who are immune from the legitimate exercise of the tax power.

(*a*) *Rate of taxation.* An obvious consideration is the rate of taxation. Diplomatic correspondence has not infrequently contained protests

[1] See Bindschedler, *Verstaatlichungsmassnahmen und Entschädigungspflicht nach Völkerrecht* (1950), p. 13 and citations therein.

[2] See Re, *Foreign Confiscations* (1951), p. 15.

[3] See Feilchenfeld, *Public Debts and State Succession* (1931), p. 628.

[4] See ibid.

[5] See Herz in *A.J.I.L.* 35 (1941), p. 251.

[6] See ibid., p. 256.

against 'exorbitant' taxes,[1] even those for military purposes in war-time,[2] on the ground that they are confiscatory and so contrary to international law. Nevertheless, it is difficult to draw any general conclusions from the available material as to the rate at which a tax may be considered to be confiscatory.[3] The protests against high taxes have often evoked a vigorous defence based on the sovereign right of the taxing states.[4] Moreover, much of the diplomatic discussion about tax rates dates from a period before the spectacular world rise in tax rates following the First World War, a phenomenon which has made a normal occurrence of what in earlier years would have appeared to be confiscatory taxation.[5]

To some extent the reasonableness of a tax rate must depend on the circumstances, among which one of the most important would seem to be the ability of the taxpayer to pay. If the rate is so high that a substantial number of taxpayers must lose their property through inability to pay, the tax may be regarded as confiscatory. On this basis the United States protested against the Carranza decrees increasing Mexican taxation upon mining property.[6] An additional ground for objection may be afforded if the tax is 'arbitrarily increased'[7] or if the inability to pay is due to the fact that the taxpayer has become impoverished by payment of previous large sums in taxes.[8]

(*b*) *Amount of payment.* Although the rate of taxation may not be confiscatory, various circumstances may make the tax due excessive in amount. Failure to evaluate property,[9] or to evaluate it fairly,[10] or the requirement of

[1] See *Foreign Relations of the United States* (1917), p. 1040. But see Moore, *Digest* (1906), vol. iv, p. 23: 'complaints of excessive taxation are more properly questions for submission to local courts'.

[2] See *Foreign Relations of the United States* (1917), p. 1073, (1916), p. 712. But see Moore, *Digest* (1906), vol. ii, pp. 62–65.

[3] For examples of tax laws considered to be confiscatory see the Mexican Mining Decree of 1 March 1915, *Foreign Relations of the United States* (1915), pp. 900–1; the Mexican Ore Tax Decree of 19 March 1915, ibid., p. 905. In *In re Bunge* (1940), 186 Fallos 421, reported in the *Annual Digest*, 1938–40, Case No. 133, p. 380, the Supreme Court of Argentina held that a succession surtax of 50 per cent. upon the property in Argentina of a non-resident alien, passed to another non-resident alien, was confiscatory and hence unconstitutional. An interest charge of 1 per cent. per month, which amounted to 15.52 per cent. of the property, was not regarded as confiscatory. A tax of 34.25 per cent. was held to be confiscatory in *In re Gallino* (1931), 160 Fallos 247, noted in the *Annual Digest*, 1938–40, p. 382. See also *State of South Australia & Others* v. *Commonwealth of Australia & Another* (1942), 2 *Australian Income Tax Reports* 273, in which the High Court pointed out that it was legally impossible for the Court to fix limitations upon Parliament as to the rate of tax which that body imposes.

[4] See *Foreign Relations of the United States* (1916), p. 719.

[5] The material for the above analysis is based largely on diplomatic correspondence between the United States and Mexico in the years 1914–17. For an indication of the present comparative rates of income taxation in Western Europe see *Economic Survey of Europe in 1950* (1951), p. 146. For income tax rates in the United States during the same period see Internal Revenue Code, ss. 11 and 12.

[6] See *Foreign Relations of the United States* (1915), p. 927.

[7] See ibid., p. 922.

[8] See ibid., pp. 893, 896.

[9] See ibid. (1914), p. 766.

[10] See Moore, *Digest* (1906), vol. ii, p. 65.

payment in dear currency at an unfavourable rate of exchange,[1] may have this effect. Particularly, however, repeated requests for payment of the same taxes from rival governments may give rise to taxation which is confiscatory in its effect upon aliens. It is a recognized principle of international law that aliens may pay legal taxes to the *de facto* authority of the area in which they or their property may be situated and that such payment relieves them from the obligation to pay the same taxes at a later date to any other authority.[2]

(*c*) *Time for Payment.* A closely related point is the question of the amount of time for payment. Even if the rate of taxation cannot be deemed confiscatory or the amount excessive, the demand for payment may be so sudden that the taxpayer is unable to pay in the time allotted and thus loses his property as a result. Many diplomatic protests have deemed taxes confiscatory on the ground that an unreasonably short time has been allowed for payment,[3] especially in situations where the penalty of immediate forfeiture has been decreed for failure to pay within the specified time[4] or where taxpayers have not been granted a reasonable time to wind up their affairs.[5]

(*d*) *Legality.* Protests have also been made against taxes deemed to be confiscatory on the ground that they were retroactive in effect,[6] contrary to contractual rights,[7] or in some other way illegal[8] or unconstitutional.[9] Taxes purposely designed to result in the confiscation of alien property are clearly violative of international law regardless of whether they also violate some rule of municipal law.[10]

II. CONVENTIONAL INTERNATIONAL LAW

Conventional international law on the taxation of aliens deals primarily with problems of jurisdiction, which have been discussed above,[11] of enforcement, to be discussed separately,[12] and of discrimination.[13] As already pointed out, the state of customary international law on the discri-

[1] See *Foreign Relations of the United States* (1914), pp. 741 ff.

[2] See ibid., pp. 728, 738, 756–7, and (1915), pp. 916, 966, 972, 979, 982–3. See further on this subject Hackworth, *Digest*, vol. i (1940), pp. 130–2, 138–42; Borchard, *The Diplomatic Protection of Citizens Abroad* (1915), p. 208; Silvanie in *A.J.I.L.* 33 (1939), pp. 93 ff.

[3] See *Foreign Relations of the United States* (1915), pp. 943–4, and (1916), p. 710.

[4] See ibid., (1914), p. 766, (1915), pp. 985, 987, and (1916), p. 709.

[5] See ibid. (1907), Part II, p. 731. [6] See ibid. (1917), pp. 1067–8. [7] Ibid.

[8] See ibid., p. 1040. [9] See ibid. (1914), p. 766.

[10] See ibid. (1917), pp. 1040–1. Although some diplomatic protests have mentioned as a ground for objection to taxes the failure of the taxing state to apply the proceeds of taxation to the purposes for which the taxes were ostensibly raised (see Moore, *Digest* (1906), vol. iv, p. 21), it does not seem that this in itself would be a legitimate objection to taxes upon aliens, for 'as a general proposition, the right to tax includes the power to determine the amount which must be levied, and the objects for which that amount will be expended' (see ibid., p. 21, and vol. ii, pp. 59, 63).

[11] See *supra*, pp. 152 ff. [12] See above, p. 153, n. 2.

[13] There is relatively little material in conventional international law on confiscatory taxation. After the Second World War several nations levied extraordinary taxes upon capital to confiscate illegal war profits, combat inflation, and provide funds for reconstruction. A number of treaties

minatory taxation of aliens is ambiguous.[1] The two chief types of treaty provisions dealing with the problem are the most-favoured-nation clause and the national treatment clause.

C. *The most-favoured-nation clause*

1. *Form of the clause*

One method of eliminating the discriminatory taxation of foreigners is the most-favoured-nation clause. In its ordinary form this clause provides for treatment as favourable as that accorded to any other nation and thus serves as protection against discrimination among different classes of aliens but not against discrimination between aliens and natives.[2] There are a number of different types of the most-favoured-nation clauses relating to the taxation of aliens. Usually, the provision applies equally to both parties to a bilateral agreement[3] with reciprocity sometimes specifically mentioned, particularly in the earlier agreements, as a condition for the operation of the clause;[4] but an extension of most-favoured-nation treatment in taxation by one state to another without reciprocity, at least in a narrowly restricted area, is not unknown.[5] The treatment to be accorded is generally referred to as that accorded to 'the most favored nation' or the most favourable treatment accorded to 'any third state',[6] although the most favoured nation may occasionally be specifically named.[7] In addition to being found in formal treaties, the provision is frequently contained in agreements by exchange of notes,[8] which sometimes are interpretative of previous treaties.[9]

2. *Interpretation of the clause*

Unless qualifications are specified, the clause would seem to be unconditional. An example of its unconditional application may be found in the

were concluded with respect to these taxes to prevent double taxation. See *I.T.A.*, vol. ii, pp. 127–35. Treaty provisions on confiscation also exist in connexion with the enforcement of taxes. See the Convention of 1945 between France and Monaco on Illicit Profits, ibid., vol. i, p. 427.

[1] See *supra*, pp. 170 ff.

[2] Thus in his note to the American chargé at Bogotá in 1888, the United States Secretary of State declared that by the most-favoured-nation clause of the Treaty of 1846 between the United States and Colombia, 'citizens of the United States in Colombia are exempted from paying any tax from which the subjects or citizens of another power are exempt': see Moore, *Digest* (1906), vol. ii, p. 57. However, for the broader principle that 'there shall be no undue discrimination against citizens of the United States wherever they may be resident', which includes discrimination as between Americans and natives, the Secretary of State had to rely upon the general law of nations: ibid.

[3] See Article IV of the Treaty between Mexico and the United States of 1942, *U.N.T.S.*, vol. 13, p. 232; Article I of the Treaty between Brazil and Canada of 1941, ibid., vol. 67, pp. 265–7.

[4] See Article 3 of the Treaty between Czechoslovakia and Latvia of 1922, *L.N.T.S.*, vol. 20, p. 383.

[5] See Article 12 (3) of the Treaty of Peace between Esthonia and the Soviet Union of 1920, ibid., vol. 11, p. 65.

[6] See *supra*, nn. 3 and 4.

[7] See Article 3 of the Treaty of 1921 between Norway and Egypt, *L.N.T.S.*, vol. 5, p. 35.

[8] See Agreement of 1947 between Italy and the United States, *U.N.T.S.*, vol. 36, p. 140.

[9] See Agreement of 1931 between Lithuania and Sweden, *L.N.T.S.*, vol. 107, p. 464.

case of the discriminatory inheritance tax on non-resident aliens imposed by the Territory of Hawaii. Several British subjects claimed that the tax violated the Convention of 1899 between the United States and Great Britain. Article V of the Convention provided that in 'all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the High Contracting Parties shall in the Dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation'. The Treaties between the United States and Bavaria of 1845 and between the United States and Colombia of 1846 stipulated that the nationals of those countries inheriting property in the United States could not be taxed at a higher rate than residents of the United States.

In answer to the argument that British citizens were thus entitled to the same rights accorded to Bavarian and Colombian subjects, the Territory of Hawaii contended that 'the most favored nation clause of a treaty does not apply to special concessions granted by treaty to other nations in return for similar concessions granted by such other nations by treaty in return therefor'. All the treaties cited by the taxpayers to substantiate their claim were treaties by which the United States had granted certain privileges to other nations in return for similar concessions granted by them to the United States. Nevertheless, it was held that the most-favoured-nation clause had to be applied unconditionally, and the discriminatory tax could therefore not be collected.[1] It should be noted that, as the foregoing case illustrates, the most-favoured-nation clause may prevent discrimination between aliens and natives as well as between different classes of aliens, if the most-favoured nation has been accorded national treatment.

3. *Scope of the clause*

Apart from the nature of the protection which the clause affords, there remains the question of its scope in tax matters. The language of international agreements on the matter ranges from considerable specificity to extreme generality. The most specific provisions are likely to be found in special conventions with limited purposes, such as agreements on harbours,[2] maritime shipping,[3] air services,[4] commercial travel,[5] capital transfers,[6] &c.

[1] See *Hawaiian Trust Co.* v. *Smith* (1929), 31 Hawaii 196, reported in *Annual Digest*, 1929–30, Case No. 251, p. 401. See also Hackworth, *Digest*, vol. v (1943), pp. 282–3, and *Re Succession of Rener*, 48 La. Ann. 552 cited in Moore, *Digest*, vol. iv (1906), p. 24.

[2] See Agreement of 1936 between Poland and the Soviet Union, *L.N.T.S.* vol. 186, p. 211.

[3] See Article I of the Treaty of 1938 between Ecuador and Norway, *I.T.A.*, vol. i, p. 299.

[4] See Article 3 (2) of the Treaty of 1950 between Canada and Norway, *U.N.T.S.*, vol. 53, p. 332.

[5] See the Agreement of 1931 between Lithuania and Sweden, *L.N.T.S.*, vol. 107, p. 464.

[6] See Article 9 (*b*) of the Agreement of 1949 between Belgium and South Africa, *U.N.T.S.*, vol. 47, p. 17.

More general provisions on most-favoured-nation tax treatment for aliens apply to goods,[1] sometimes specified as imports[2] and exports,[3] and as agricultural and industrial products,[4] whether for consumption or in transit;[5] to nationals,[6] whatever their trade, profession, commerce, or industry;[7] to companies, whether commercial, industrial, financial, or insurance;[8] to the acquisition and use of property,[9] &c. The scope of the clause may also be determined by reference to the kind of tax rather than to the person or object upon which the tax is levied. Thus favourable treatment may extend to internal taxes,[10] regardless of the political subdivision by which they are levied,[11] to consumption taxes,[12] transit taxes,[13] tax facilities and privileges,[14] and, finally, to taxes of every kind and description.[15] The clause is also used to ensure most-favoured-nation treatment in the protection extended to taxpayers by fiscal authorities.[16]

Several specific exceptions to the operation of the most-favoured-nation clause in tax matters are noteworthy. In the Treaty of Friendship, Commerce and Navigation between the United States and China of 1946, it was provided that the most-favoured-nation treatment in regard to internal taxation would not apply in cases of advantages granted (*a*) pursuant to legislation extending the advantages on the basis of reciprocity, and (*b*) in a treaty designed to avoid double taxation or fiscal evasion.[17] Similar provisions exist in other treaties designed to avoid the application of the most-favoured-nation clause to conventions on double taxation and fiscal evasion[18] and to special frontier zone arrangements established to facilitate traffic.[19]

[1] See Article IV of the Agreement of 1946 between the United States and Yemen, *U.N.T.S.*, vol. 4, p. 168.

[2] See Articles I and II of the Treaty of 1942 between Mexico and the United States, ibid., vol. 13, p. 232.

[3] See Article I (3) of the Treaty between Iceland and the United States of 1943, ibid., vol. 29, p. 318; Article I (3) of the Treaty between Brazil and Canada of 1941, ibid., vol. 67, pp. 265–7.

[4] See Article I of the Treaty between Brazil and Canada of 1941, ibid., vol. 67, pp. 265–7.

[5] See Article 2 of the Treaty of 1921 between Czechoslovakia and Roumania, *L.N.T.S.*, vol. 15, p. 239.

[6] See Article 7 of the Treaty of 1922 between Czechoslovakia and Latvia, ibid., vol. 20, p. 383.

[7] See Article IV of the Treaty of 1948 between India and Switzerland, *U.N.T.S.*, vol. 33, p. 6.

[8] See Article VIII of the Treaty of 1926 between Norway and Siam, *L.N.T.S.*, vol. 60, p. 40.

[9] See Article I (2) of the Treaty of 1920 between Germany and Hungary, ibid., vol. 7, p. 219.

[10] See Article X (2) of the Treaty of 1946 between China and the United States, *U.N.T.S.*, vol. 25, pp. 110–12.

[11] See Article 5 of the Treaty of 1922 between Poland and Switzerland, *L.N.T.S.*, vol. 12, p. 309.

[12] See Article 10 of the Treaty of 1920 between Czechoslovakia and Germany, ibid., vol. 17, p. 113.

[13] See Article 2 of the Treaty of 1921 between Czechoslovakia and Roumania, ibid., vol. 15, p. 239.

[14] Ibid.

[15] See Article IV of the Treaty of 1948 between India and Switzerland, *U.N.T.S.*, vol. 33, p.6.

[16] See Article 2 (3) of the Treaty of 1935 between Finland and Germany, *I.T.A.*, vol. i, p. 385.

[17] See Article X (2) of the Treaty of 1946 between China and the United States, *U.N.T.S.*, vol. 25, pp. 110–12.

[18] See Article II of the Treaty between France and Germany of 1927, *L.N.T.S.*, vol. 76 p. 348.

[19] Ibid.

D. *The 'national treatment' clause*

1. *Form of the clause*

Another form of treaty protection against the discriminatory taxation of aliens is the provision that aliens will not be subjected to other or higher taxes than those imposed by the taxing state upon its own nationals in similar circumstances. This type of provision may conveniently be referred to as one establishing national or equal treatment for aliens. In some states, equal treatment with nationals has been assured by constitutional provisions,[1] by statutory law,[2] sometimes on the basis of reciprocity,[3] and by declarations of policy.[4] Nevertheless, such enactments of municipal law are subject to unilateral alteration. Furthermore, the fact that one state extends equal treatment to nationals of a foreign state does not, in the absence of treaty provisions, give the nationals of the former state the right to similar equality of treatment by the latter.[5] In recent years it has become increasingly common to protect the fiscal rights of aliens by the conclusion of international agreements providing for national treatment.[6]

Like the most-favoured-nation clause, the national treatment clause is usually reciprocal, with reciprocity sometimes expressly stipulated as a condition.[7] Where the clause is not reciprocal, this may be due to the fact that it is concerned with a problem arising in one country only as, for example, the problem of Guatemalan taxation of traffic and vehicles on the part of the Pan-American Highway in Guatemala,[8] or the question of the

[1] In *In re Kotta* (1921), 187 California 27, reported in the *Annual Digest*, 1919–22, Case No. 167, p. 240, the Supreme Court of California ordered the discharge of a Mexican citizen who had been taken into custody for failure to pay a California poll tax levied on aliens. The Court held the tax to be a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. The equal protection clause also provides protection against unfair fiscal discrimination against foreign corporations. See Hackworth, *Digest*, vol. iii (1942), pp. 716–17, and Cooley, *The Law of Taxation* (1924), vol. i, pp. 530 ff., 783, and vol. iv, p. 3504. See also the Argentine Constitution of 1860, Article 20, in Flournoy and Hudson, *Nationality Laws* (1929), p. 10, and Article 10 of the Constitution of Cuba, ibid., p. 195. Note, however, the decision of the Argentine Supreme Court in *Gastro* v. *Provincia de Buenos Aires*, reported in the *Annual Digest*, 1943–5, Case No. 66, p. 230, where it was held that a provincial tax law discriminating against non-residents of the province was unconstitutional, but that this ruling did not apply to aliens not resident in Argentina.

[2] See the Swedish Royal Decree of 1925, *British and Foreign State Papers*, vol. 122, p. 1144; the Cuban Civil Code of 1888–1889, Article 27 (6), in Flournoy and Hudson, *Nationality Laws* (1929), p. 195.

[3] See the diplomatic correspondence between the United States and Sweden, *Foreign Relations of the United States* (1928), vol. iii, pp. 885–93.

[4] See the statement of the policy of the Far Eastern Commission, *United States State Department Bulletin*, (1946), vol. 15, p. 162.

[5] See *Foreign Relations of the United States* (1925), vol. ii, pp. 127 ff.

[6] See Hyde, *International Law* (1945), vol. i, p. 664; Hackworth, *Digest*, vol. iii (1942), pp. 577, 672; Cutler in *A.J.I.L.* 27 (1933), p. 237.

[7] See Article 4 of the Convention of Lausanne on Commerce, 1923, *L.N.T.S.*, vol. 28, p. 179, and Article 1 of the Convention of Lausanne on Conditions of Residence, Business and Jurisdiction, 1923, ibid., p. 155.

[8] See the Agreement between the United States and Guatemala of 1948, *U.N.T.S.*, vol. 67, p. 166.

taxation of labour imported from one country into another.[1] In addition to formal treaties exchanges of notes have also been used to effect provisions on national treatment of aliens in fiscal matters.[2]

The most-favoured-nation clause is often used together with the national treatment clause for the protection of foreigners.[3] In such cases these clauses will operate to provide fiscal treatment for the alien which is at least as favourable as that accorded to nationals, and even more favourable than that accorded to nationals if such more favourable treatment has been accorded to any other state.[4] Nevertheless, the wording of each particular clause is crucial. Thus, for example, where the parties to the agreement provide that they must accord national treatment to each other's goods, except where there is no similar national product—in which case they must accord to each other treatment as good as that granted to any third state—the result is not the same. Under this type of provision the most-favoured-nation treatment applies only in the absence of a similar national product, but not where a similar national product exists subject to discrimination in favour of the product of the most-favoured-nation.

2. *Interpretation of the clause*

The problem of the interpretation of a national treatment clause may be illustrated by the exchange between the United States and Latvia over the Latvian residence tax. The United States sought exemption on the basis of Article 1, paragraph 2, of the Treaty of 1928 between Latvia and the United States providing for national treatment in matters of internal charges or taxes. Latvia replied that since Latvian nationals were not subject to the tax, it could not be called an internal charge or tax within the terms of the Treaty and so the Treaty was inapplicable.[5] The result of this

[1] See Article 5 of the Treaty of 1948 between Italy and the Netherlands concerning the taxation of Italian workers in the Netherlands, *U.N.T.S.*, vol. 46, p. 274; also Article 8 of a similar Agreement between Italy and Great Britain of 1947, ibid., vol. 54, p. 136. Note, however, Article 21 of the Treaty of 1919 between Italy and France, *L.N.T.S.*, vol. 5, p. 293.

[2] See the Agreement of 1947 between Great Britain and Italy, *U.N.T.S.*, vol. 54, p. 136, and the Agreement of 1948 between Guatemala and the United States, ibid., vol. 67, p. 166.

[3] For treaties containing both the most-favoured-nation and the national treatment clauses see Articles I and V of the Treaty of 1941 between Brazil and Canada, ibid., vol. 67, pp. 267, 269; Article 3 (2) of the Treaty of 1950 between Canada and Norway, ibid., vol. 53, p. 332; Article XIX (3) of the Treaty of 1946 between China and the United States, ibid., vol. 25, p. 126.

[4] See Article 13 of the Treaty of 1927 between the United Kingdom and Yugoslavia, *L.N.T.S.*, vol. 80, p. 173, which states that internal taxes on goods produced or manufactured by either 'shall not be other or greater than the dues levied in similar circumstances on the like goods of national origin, provided that in no case shall such duties be more burdensome than the duties levied in similar circumstances on the like goods of any other foreign country'.

[5] See *Foreign Relations of the United States* (1928), vol. iii, p. 239. Note also the aspect of this dispute dealing with the most-favoured nation clause: ibid., pp. 235-9. In a Hungarian case the plaintiff, an Italian subject, contended that a contract of adoption made by her was liable to a stamp duty according to the rate fixed for Hungarian subjects and not according to the higher

argument would be that any discrimination against aliens as compared with nationals could be justified under the provision so long as the burden upon aliens was not placed upon nationals as well. In another situation it was held that a national treatment clause does not have to produce complete equality so long as the difference in treatment between aliens and nationals results similarly from a non-discriminatory operation of the provisions of the law.[1]

It has been held, however, that a treaty provision for the national treatment of aliens in fiscal matters must not be circumvented by an unduly narrow interpretation. In *Nielsen* v. *Johnson*[2] the taxpayer contested an inheritance tax imposed by the State of Iowa on the ground that, being higher upon non-resident aliens than upon residents, it was in conflict with Article VII of the Treaty of 1826 between the United States and Denmark. Article VII provided that both the United States and Denmark would impose

'no higher or other duties, charges or taxes . . . in the territories or dominions of either party, upon any personal property, money or effects of their respective citizens or subjects, on the removal of the same from their territories or dominions reciprocally, either upon the inheritance of such property, money or effects, or otherwise, than are or shall be payable in each State upon the same, when removed by a citizen or subject of such State respectively'.

It was argued that this provision did not prevent the tax in question because the tax was on succession and not on property or its removal and because the only tax discrimination prevented by the Treaty was that on the power of disposal of the estate, not the privilege of succession. The Supreme Court of the United States, interpreting the Treaty liberally, rejected this argument, pointing out that the purpose of Article VII was to relieve the citizens of each country from higher taxes upon their property within the other than those paid by the inhabitants of the place where the property was located, whether in the disposal or in the inheritance of such property.[3]

rate prevailing for aliens. Her argument was based upon Article 211 (*c*) of the Peace Treaty of Trianon, by which Hungary undertook not to subject nationals of the Allied and Associated Powers to any tax other or higher than those imposed upon Hungarian nationals. The Administrative Court decided against the plaintiff on the ground that the treaty provision referred 'only to matters of an economic nature but not to matters in the domain of family law . . .': see *In re Silvia G.*, Közigazgatási és Pénzügyi Jogi Döntvénytár, XX, No. 108, reported in the *Annual Digest*, 1927–8, Case No. 228, p. 336.

See also the diplomatic exchange between the United States and France concerning the applicability to American citizens in Madagascar of the national treatment provision in Article 7 of the Treaty of 1853 between the United States and France. The French took the view that, since the provision referred only to the 'States of the Union' and 'France', it could not apply to colonies of either party: *Foreign Relations of the United States* (1926), vol. ii, pp. 129–34.

[1] See *Watson et al.* v. *Hoey* (1943), 59 F. Supp. 197, reported in the *Annual Digest*, 1943–5, Case No. 90, p. 273.

[2] (1929), 279 U.S. 47. See Hackworth, *Digest*, vol. iii (1942), pp. 669–70.

[3] See further ibid., pp. 670–1, vol. v (1943), pp. 224–5; *Foreign Relations of the United States*

3. *Scope of the clause*

The scope of a clause providing for the national treatment of aliens in fiscal matters may vary widely. The narrowest provisions generally are to be found in special conventions designed for a very limited purpose. Thus in the Treaty of 1928 between Hungary and Yugoslavia for the Settlement of Debts, Article 15 provided that the sums due by nationals of one state to nationals of the other should not be subject to heavier taxation than sums due between nationals of the same state.[1] It has been stipulated in the agreements between Italy and other countries concerning Italian labour that Italian workers abroad must receive the same fiscal treatment as the nationals of the states to which they are migrating.[2] Similar agreements exist with regard to the taxation of transportation by vehicle[3] and by boat,[4] of cultural activities,[5] &c.

Detailed provisions may also be found, however, in treaties of wider scope.[6] The more broadly framed treaty provisions on equal fiscal treatment may embrace 'the manufacture, preparation or employment of goods' or their 'exhibition, transport, sale or use', 'real property', 'income', and 'fortune', 'commerce, profession, industry, enterprise or activity of any kind', 'scientific, educational, religious or philanthropic activities', &c. They may apply to corporations of all kinds, their associates, branches, agents and representatives, to resident aliens, to aliens who are in the country even temporarily, or to all aliens, whether physically present or not. It has been argued that the national treatment clause should not apply to aliens who are not in the territory of the taxing state, even though the language of the clause may appear to be broader, but this argument has been rejected.[7] On

(1912), pp. 323 ff.; and Vallance in *A.J.I.L.* 23 (1929), pp. 395–8, 422, 826. For an example of the invalidation of a discriminatory state poll tax upon aliens due to the national treatment clause in the Treaty of 1911 between Japan and the United States see *In re Terui*, 187 Cal. 20, reported in the *Annual Digest*, 1919–22, Case No. 231, p. 230.

When Haiti imposed a licence tax upon foreign business the United States objected upon the ground that this violated the broad provision in the treaty between the two countries that Americans engaged in business in Haiti should not be obliged to pay 'any contributions whatever' other or higher than those paid by natives. The Haitian Government relinquished its claim for the fee but insisted that American citizens apply for business licences, a requirement with which the latter complied. See Moore, *Digest* (1906), vol. ii, pp. 57–58.

[1] See *L.N.T.S.*, vol. 100, p. 359.

[2] See Article 7 of the Agreement of 1947 between Italy and Great Britain, *U.N.T.S.*, vol 54, p.136; Article 5 of the Agreement of 1941 between Italy and the Netherlands, ibid., vol. 46, p. 274; and Article 21 of the Treaty between Italy and France of 1919, *L.N.T.S.*, vol. 5, p. 293.

[3] See the Supplementary Agreement of 1948 between Guatemala and the United States, *U.N.T.S.*, vol. 67, p. 166.

[4] See Article 16 of the Treaty between Czechoslovakia and Roumania of 1921, *L.N.T.S.*, vol. 15, p. 245.

[5] See Article 11 of the Treaty between Bulgaria and Czechoslovakia of 1947, *U.N.T.S.*, vol. 46, p. 32.

[6] See Article 24 of the Treaty of 1920 between Austria and Germany, *L.N.T.S.*, vol. 4, p. 239.

[7] See *Olsson* v. *Savage* (1925), 119 Kansas 603, wherein the relevant clause of the Treaty of 1910 between Sweden and the United States stated: 'The citizens of each of the contracting parties shall have power to dispose of their personal goods within the jurisdiction of the other . . .

the other hand, where the treaty provides that national treatment shall extend to nationals of one state 'within the territories of the other',[1] then non-resident aliens will not be benefited thereby.[2]

The scope of the national treatment clause may also be delimited in other terms, such as the identity of the taxing authority,[3] the type of tax,[4] and various kinds of exemptions, deductions, and reliefs.[5] Treaties dealing exclusively with tax matters sometimes stipulate that national treatment shall extend only to those taxes within the scope of the treaty.[6] Others provide a more general clause on national treatment, which may be limited to such taxes only as are within the scope of the treaty because of the restrictive definitions of 'taxes'.[7] Still others leave little doubt that national treatment was intended to apply to all taxes, even those outside the scope of the other provisions of the treaty.[8] Special exceptions to the operation of the clause may be expressly stipulated in the agreement. These may cover such matters as passport and similar fees, sojourn taxes, certain commercial and luxury taxes, undertakings established by the state, and the like. Some agreements provide for national treatment in the protection afforded to taxpayers by the fiscal authorities.[9]

paying such dues only as the inhabitants of the country wherein such goods are shall be subject to pay in like cases': Hackworth, *Digest*, vol. iii (1942), p. 668.

[1] See Article I of the Treaty of 1923 between the United States and Germany, in ibid., p. 577.

[2] Thus Article I of the Treaty of 1923 between the United States and Germany provided: 'The nationals of either High Contracting Party within the territories of the other shall not be subjected to the payment of any internal charges or taxes other or higher than those that are exacted of and paid by its nationals.' When Germany protested that the provisions of s. 211 of the United States Revenue Act of 1936 violated the Treaty on the ground that they imposed different taxes upon the income of non-resident German nationals than upon the income of non-resident American citizens, it was pointed out that the Treaty of 1923 applied only to aliens resident within the borders of the contracting parties and not to non-resident aliens: see Hackworth, *Digest*, vol. iii (1942), p. 577.

[3] That is, whether the tax is levied by federal, state, or municipal authorities. See Article 11 of the Convention of Lausanne on Conditions of Residence, Business and Jurisdiction, 1923, *L.N.T.S.*, vol. 28, p. 161; Article 4 of the Convention of Lausanne on Commerce, 1923, ibid., p. 179.

[4] See Article 8 of the Agreement between Great Britain and Italy of 1947, *U.N.T.S.* vol. 54, p. 136; Article 4 of the Convention of Lausanne on Commerce, 1923, *L.N.T.S.*, vol. 28, p. 179.

[5] See Article 8 of the Treaty of 1945 between France and the United Kingdom, *I.T.A.*, vol. i, p. 129; Articles XIX and XX of the Treaty of 1950 between France and the United Kingdom, ibid., vol. ii, pp. 119–20; Article XIV of the Treaty of 1948 between the Netherlands and the United Kingdom, ibid., p. 25.

[6] See Article XX (3) of the Treaty of 1948 between Belgium and the United States in ibid., p. 36; Point V of the Protocol to the Treaty of 1939 between France and the United States, ibid., vol. i, p. 97; Article VI of the Treaty of 1949 between Ireland and the United Kingdom, ibid., vol. ii, p. 151.

[7] See Articles I and III of the Treaty of 1946 between the Union of South Africa and the United States, ibid., vol. i, pp. 160, 161; Articles I and XVIII (1) of the Treaty of 1948 between the Netherlands and the United Kingdom, ibid., vol. ii, pp. 23, 26.

[8] See Article XXI of the Treaty of 1945 between the United Kingdom and the United States, ibid., vol. i, p. 124; Article XXV of the Treaty of 1948 between the Netherlands and the United States, ibid., p. 246; Article XVI of the Treaty of 1948 between Denmark and the United States, ibid., p. 252.

[9] See, e.g., Article 2 of the Treaty of 1940 between Germany and Yugoslavia, *I.T.A.*, vol. i, p. 409.

The national treatment clause, as far as it appertains to fiscal matters, is generally to be found in bilateral pacts. There are several examples, however, of its inclusion in multilateral agreements. Thus the Draft Convention on the Treatment of Foreigners, produced by the Economic Committee of the League of Nations in 1928, provided in Article 12:

'1. On the matter of taxes . . . nationals of each of the High Contracting Parties shall enjoy in every respect in the territory of the other High Contracting Parties, both as regards their person and property, rights and interests, including their commerce, industry and occupation, the same treatment and the same protection by the fiscal authorities and tribunals, as nationals of the country.

'2. In fixing the rates of taxation and duties of any kind levied on commerce and industry, no discrimination shall be made on account of differences in the origin of the goods employed or offered for sale.'[1]

Unfortunately, when the Draft was presented to the International Conference on the Treatment of Foreigners at Paris in 1929, the attending states found it unsatisfactory and were unable to reach any agreement upon an alternative.[2] A less ambitious attempt to protect the rights of aliens in fiscal matters succeeded in the Convention Regarding the Status of Aliens adopted by the Sixth International Conference of American States at Havana in 1928. Article 4 of the Convention provides:

'Foreigners are obliged to make ordinary or extraordinary contributions, as well as forced loans always provided that such measures apply to the population generally.'[3]

The most recent use of the national treatment clause in a multilateral agreement is Article III of Part II of the General Agreement on Tariffs and Trade of 1947,[4] as modified by the Protocol of 1948.[5] This provision, now accepted by many of the chief states of the world,[6] establishes the principle that internal taxes affecting commerce shall not be applied to afford protection to domestic over imported products, either by subjecting imports to internal taxes in excess of the taxes applied to domestic products or in any other way. An exception is permitted in the case of internal taxes which are inconsistent with this principle but which are specifically authorized under a trade agreement in force on 10 April 1947, in which the import duty on the taxed product is bound against increase. In such cases the taxing state may

[1] See Part I, Article 12, of the Draft Convention on the Treatment of Foreigners, Economic Committee of the League of Nations, 1928. See also Part III, Article 20. For comment upon the fiscal provisions of the Draft see Cutler in *A.J.I.L.* 27 (1933), p. 237.

[2] For the reasons why the Conference failed to reach agreement on a convention see 'Report on the Work of the International Conference on the Treatment of Foreigners' and Final Protocol of the Conference, *League of Nations Official Journal*, January–June, 1930, pp. 168–71, Doc. C. 10. 1930. II. See also Article 15 of the Report of the Economic Commission of the Genoa Conference in Mills, *The Genoa Conference*, p. 422.

[3] See *L.N.T.S.*, vol. 132, p. 307.

[4] See *U.N.T.S.*, vol. 55, pp. 204–6, 216.

[5] See ibid., vol. 62, pp. 82 ff., 104.

[6] For a list of the parties to the Agreement on 14 December 1948, when it came into effect, see ibid., p. 80.

continue the discriminatory internal tax until the time when it can obtain release from the obligations of the trade agreement in order to permit the increase of the duty and compensate for the elimination of the protection afforded by the tax. The clause does not apply to taxes connected with procurement for governmental purposes and does not prevent the use of subsidies to domestic producers from the proceeds of taxes applied within the terms of the agreement.[1]

IV. Conclusions

The right to tax aliens is a prerogative of the sovereign state—a prerogative which is limited by rules of customary and conventional international law. Its development has been based upon the recognition of the equality of states in fiscal matters and of the need for minimum standards for the fiscal protection of aliens. The right is coextensive with the territorial sovereignty of the state except for privileges and immunities and the jurisdictional limitations established by international agreements, notably those for the prevention of double taxation. Although the numerous treaties concluded on this subject in recent years have had much the same general purpose, the differences in the tax systems of the contracting states made it desirable to proceed by means of bilateral rather than multilateral agreements. Thus these treaties constitute a body of particular rather than general international law, which may eventually become more generalized. Within the sphere in which it may be exercised, the right to tax aliens is further restricted by rules against unfair discrimination and confiscation. While these rules are somewhat ambiguous, the law on discrimination has been substantially clarified by numerous treaty provisions for national and most-favoured-nation treatment.

[1] See further the additions to Article III, *U.N.T.S.*, vol. 62, p. 104.

THE VALIDITY OF NON-REGISTERED TREATIES

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THE principle of registration of treaties[2] accepted in Article 18 of the Covenant of the League of Nations has been carried forward by Article 102 of the Charter of the United Nations which reads as follows:

'1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

'2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.'

Little attention has been paid to the sanction provided in paragraph 2 of this Article concerning the non-registration of treaties which come within the scope of paragraph 1, and it is proposed therefore to inquire here into the effect of that sanction upon the validity under international law of treaties which have not been registered. In order to determine what experience can be gained from the precedent afforded in Article 18 of the Covenant,[3] it is convenient to refer to the corresponding sanction contained in that Article, which reads as follows:

'Every Treaty or International Engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such Treaty or International Engagement shall be binding until so registered.'

I. *The sanction contained in Article 18 of the Covenant*

During the existence of the League of Nations a considerable literature was devoted to the task of analysing and elucidating the phrase 'no such Treaty or International Engagement shall be binding until so registered'.[4]

[1] The views expressed in this article are the personal views of the author.

[2] The term 'treaty' has been used throughout this study to include every type of treaty, international agreement, engagement or instrument, written or otherwise, whatever its form and descriptive name.

[3] Reference will not be made, however, to the system of registration of treaties adopted by the Organization of American States, on which see Hudson in *American Journal of International Law*, 38 (1944), pp. 98–99.

[4] See Lambiris, 'L'enregistrement des traités d'après l'article 18 du Pacte de la Société des Nations', in *Revue de droit international et de législation comparée*, 7 (3rd ser., 1926), pp. 697–709, at p. 705.

According to one theory, which attached the least legal consequences to the sanction in Article 18, the only effect of non-registration upon a treaty was to prevent it from being relied upon or invoked before an organ of the League of Nations. This view gained comparatively little support.[1] Another theory advanced was that whilst a bilateral treaty, the ratifications of which had been exchanged, was clearly in existence, nevertheless, until registration, it remained 'dépourvu de force exécutoire'.[2] It has been suggested that the legal consequence following from non-registration according to this view may be compared with the private law analogy of a contract which, falling within the scope of Section 4 of the Statute of Frauds, has failed to comply with the requirements of that Section and is therefore unenforceable.[3] The main distinction between the first theory and this one would therefore appear to be that whereas, according to the former, a non-registered treaty could not be relied upon before a League organ, but was otherwise in every respect of full validity, according to the latter, such a treaty could not be relied upon in any international proceedings whatsoever.[4] At the same time, according to this theory, despite the unenforceable nature of the treaty the parties, having ratified, were considered no longer to be in a position to denounce it unilaterally, and were estopped from actions inconsistent with its terms although not required to perform their obligations thereunder.[5] Moreover, the view was expressed that so far as concerned a treaty between two Members of the League, it was not only unenforceable pending registration, but was also to be regarded as void if not registered within 'a reasonable time'.[6]

Support for this view of the force of the sanction in Article 18 came from, amongst others, the Committee of Jurists appointed by the First Assembly of the League, the First Committee of the Second Assembly of the League to whom the Committee of Jurists' report was presented, and also from the Adatci-De Visscher Report on the interpretation of Article 18 prepared for the session of the Institute of International Law held in 1923.[7] This particular theory of the effect of non-compliance with Article 18 emphasized the difficulty associated with the language of that Article inasmuch as

[1] It may, however, have influenced those responsible for the drafting of paragraph 2 of Article 102 of the Charter. It is interesting to note that Fauchille in his *Traité de droit international* (1926), vol. i, part 3, at p. 340, made a sound criticism of this theory by pointing out that it was difficult to reconcile the fact that a non-registered treaty would be deemed to be legally non-existent in a dispute before the Permanent Court of International Justice, but would be valid when invoked before a tribunal of the Permanent Court of Arbitration.

[2] Adatci-De Visscher Report to the Institute of International Law, *Annuaire*, 30 (1923), pp. 47–64, at p. 53.

[3] See Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), p. 827, footnote 1.

[4] See the *Pablo Najera Case: Annual Digest of Public International Law Cases*, 1927–8, Case No. 271.

[5] Ibid.

[6] Oppenheim, op. cit., p. 827, footnote 1.

[7] *Annuaire*, 30 (1923), pp. 47–64.

non-registered treaties would come into force according to their terms, but would not be 'binding' until registered.[1]

However, the proponents of this theory were divided amongst themselves on the matter of the retroactive effect of registration. Thus, some[2] were inclined to the opinion that there could be no question of retroactivity on the ground that this would have necessitated an express stipulation to that effect in Article 18, and that therefore the date a treaty became 'binding' was its date of registration. Others felt that the obligation to register did not affect the legal significance of ratification, and that the consequence of registration was therefore to give the treaty binding force *ex tunc*. It is interesting to note that after a long discussion of this problem the First Committee of the Second Assembly of the League adopted a compromise proposal whereby, when registration took place within three months of the date of the conclusion of a treaty, the latter acquired full binding validity as of such previous date. However, in the case of a treaty registered after the expiration of the three month period, the effective date was that of registration.

Yet a third theory regarding the effect of non-registration upon a treaty which fell within the scope of Article 18 was that even after the exchange of ratifications such a treaty had no legal effect whatsoever.[3]

Another important question concerning the scope of the sanction contained in Article 18 was its effect upon bilateral treaties concluded between a Member of the League and a non-member, since even in such a case the obligation to register fell upon the Member. A distinction in this connexion was first to be drawn between a non-member state which was bound by one of the Peace Treaties and one which was not so bound. It was considered that whereas, with respect to the latter, Article 18 was *res inter alios acta*, the former was in the same position as a Member, on the ground that the provisions of the Covenant were incorporated into the Peace Treaties.[4] Thus a treaty concluded between a Member and a non-member state not a party to the Peace Treaties, did not depend upon registration for its binding validity.[5] In the *Pablo Najera* case,[6] decided in 1928, the French-Mexican Claims Commission disallowed the Mexican contention that by reason of the failure of the French Government to register the French-Mexican Claims Convention of 25 September 1924 (under which the Commission was set up), it was not 'binding' upon Mexico, which was at that

[1] See Hyde, *International Law chiefly as interpreted and applied by the United States* (2nd rev. ed., 1947), vol. ii, p. 1376. Cf. McNair, *The Law of Treaties* (1938), p. 158, footnote 1.

[2] See, for example, Alvarez in *League of Nations Documents*, Records of the Second Assembly (1921), Minutes of the First Committee, Eighth Meeting, p. 73.

[3] See Fauchille, op. cit., p. 339, and Reitzer, 'L'enregistrement des traités internationaux', in *Revue générale de droit international public*, 44 (1937), pp. 67–89, at p. 76.

[4] Adatci-De Visscher Report, loc. cit., p. 54.

[5] Ibid.

[6] *Annual Digest*, 1927–8, Case No. 271.

time not a Member of the League (and not a party to the Peace Treaties). The President of the Commission in his award held that it was impossible to interpret Article 18 as constituting the application of a general rule of law, and that it did not have the character of limiting the juridical capacity of Member states.[1] Registration of a treaty therefore only produced a legal effect before an international tribunal other than an organ of the League, according to the judgment, as between parties thereto which were both Member states. It followed that in the circumstances of the case, in accordance with the principle *pacta tertiis nec nocent nec prosunt*, the absence of registration could not be relied upon by Mexico in its favour in order to avoid its international obligations. It would appear to be equally arguable that if a Member state of the League wilfully failed to perform its duty to register a treaty concluded with a non-member, it, too, would be unable to disregard the 'binding' character of the treaty.[2] *Nemo ex suo delicto meliorem suam conditionem facere potest.*

The judgment in the *Pablo Najera* case also contained an *obiter dictum* that whereas Article 18 applied to a treaty concluded between two Members of the League before whatever international tribunal it was invoked, it applied to a treaty concluded between a Member and a non-member only before an organ of the League. Although the Permanent Court of International Justice was not an 'organ' of the League under the Covenant, in contrast to the position of its successor under the Charter, it was established by the League in accordance with Article 14 of the Covenant, and it is therefore relevant to note here that whilst it did not pass upon the possible legal effect of non-registration, it did not refuse to give effect to a treaty on that account.[3] Thus, in the *Eastern Greenland* case, involving two Member states, the Permanent Court gave effect to an international engagement (which, it will be recalled, was the term of art in Article 18 of the Covenant) which had not been registered.[4] In that case the Court held as binding upon the Norwegian Government an oral declaration made by M. Ihlen, the Norwegian Foreign Minister, to the Danish Minister to Oslo to the effect that the plans of the Danish Government respecting Danish sovereignty over eastern Greenland would meet with no objections on the part of Norway. It is clear, of course, that from a practical standpoint the

[1] Reitzer has suggested, however, that non-members were estopped from denying ignorance of Article 18: loc. cit., p. 88.

[2] The non-member, however, would have been able to register the treaty, though not obliged to do so. See Memorandum approved by the Council of the League, dated 19 May 1920, paragraph 13, *League of Nations Treaty Series*, vol. 1, p. 13.

[3] See generally, Hudson, 'Legal Effect of Unregistered Treaties in Practice, under Article 18 of the Covenant', *American Journal of International Law*, 28 (1934), p. 546, at p. 552. For an explanation of the Court's action see the Report on the Law of Treaties by the learned Editor of this *Year Book* in his capacity as Special Rapporteur to the International Law Commission of the United Nations: U.N. Doc. A/CN. 4/63, pp. 217–18.

[4] Permanent Court of International Justice, Series A/B, No. 53, pp. 69 ff.

oral declaration would need to be committed to writing or given some kind of permanent authentication in order to be registrable. Nevertheless, the fact that the declaration was made by M. Ihlen, acting on behalf of Norway, with the intent that Denmark might legally rely upon the obligation therein assumed, indicates that it fell within the scope of the League Council Memorandum of 19 May 1920, which interpreted the phrase in Article 18 'every Treaty or International Engagement',[1] and was therefore susceptible to registration.[2] Notwithstanding its non-registration the Permanent Court arrived at the conclusion that the declaration was 'binding'. However, it is important to bear in mind that the decision in the case was primarily directed to the point that, despite its peculiar form, the declaration constituted a unilateral engagement under international law. From this decision it followed that the engagement was 'binding', but this secondary result was not reached in any way by means of a disregard of the provisions of Article 18, but simply as a necessary consequence of the first conclusion. The matter, therefore, whilst possessing a certain relevance to the position under Article 102 of the Charter, is mainly of academic interest.

II. *General scope of the sanction contained in Article 102 of the Charter*

In the light of the divergent interpretations and difficulties which arose as to the precise scope and meaning of Article 18 of the Covenant, the drafters of the Charter at San Francisco were determined to avoid a repetition of the same language in their formulation of a sanction against the non-registration of treaties which were required to be registered. Whilst, on the one hand, they sought to avoid any ambiguity of wording, they wished to provide for a sanction which they considered more feasible and yet which at the same time would have more weight and effect behind it. They desired to penalize, in a sense, a state which failed to perform its obligation to register a treaty concluded by it, or which unduly delayed registration, and they desired the penalty to be a serious one without, at the same time, affecting the validity of the treaty. It is possible that in their eagerness to avoid the pitfalls of the Covenant they may have unwittingly created fresh ones under the Charter.[3]

The Rapporteur of Committee IV/2 at San Francisco, which was respon-

[1] *League of Nations Treaty Series*, vol. 1, p. 9.

[2] See Brandon, 'Analysis of the terms "treaty" and "international agreement" for purposes of registration under Article 102 of the United Nations Charter', in *American Journal of International Law*, 47 (1953), pp. 49–69, at p. 54.

[3] Already during the second part of the first session of the General Assembly an attempt was made in the sub-committee of the Sixth Committee which was responsible for the drafting of the Regulations to give effect to Article 102 (subsequently adopted by the General Assembly in Resolution 97 (I), and hereinafter referred to as the 'registration regulations'), to interpret the meaning of paragraph 2. This was considered as beyond the competence of the Committee: U.N. Doc. A/C. 6/125.

sible for the drafting of paragraph 2 of Article 102, set out in his report the following statement (which was approved by the Committee) of the policy considerations which guided the Committee in their deliberations on choice of language:

'*Paragraph 2*

'This paragraph formulates sanctions concerning the obligation imposed in paragraph one. The Committee has preferred to depart from the formula used in Article 18 of the Covenant of the League of Nations which states that non-registered treaties shall have no obligatory force. It has confined itself to a sanction which has reference to the faculty of the parties to invoke the international treaty or agreement before the Organization, which sanction, while giving all the efficacy desired by the obligation imposed in paragraph one, will not give rise in practice to difficulties of interpretation or application.'[1]

It is possible that the Rapporteur may have been somewhat too dogmatic in his assertion that the sanction 'will not give rise in practice to difficulties of interpretation or application', particularly in view of the unresolved problems arising out of the language of the paragraph, which were themselves the subject of discussion in the Committee and subsequently. Some of these are worthy of examination and will be treated separately. However, it may be pertinent before so doing to offer some general observations regarding the scope of the sanction.

Thus it would seem that the various theories which were developed as to the meaning and scope of Article 18 of the Covenant, and which have been outlined above, will be generally irrelevant for the purposes of establishing the precise legal effect of paragraph 2 of Article 102. There can be no question therefore as to the 'binding' force of a treaty validly concluded notwithstanding its non-registration. It follows that fortunately the question of retroactivity which so intrigued international lawyers during the period of the League does not arise. Nor can such a treaty be properly considered as 'unenforceable'. Therefore only the view of Anzilotti that the effect of the sanction in Article 18 was to prevent the treaty concerned from being invoked before an organ of the League, may be said to have a direct bearing upon the present discussion.

It is generally recognized that the solution adopted in Article 102 of the Charter is more limited and less drastic than that in Article 18 of the Covenant.[2] But how limited is the present rule? The answer, in general terms, would appear to be that whilst it does not alter the binding character of a treaty, it does have a certain invalidating effect which is confined to the legal realm of the United Nations. Thus, Kelsen in his *Law of*

[1] United Nations Conference on International Organizations (hereinafter referred to and cited as *U.N.C.I.O.*), *Documents*, vol. 13, Commission IV, p. 706.

[2] See Goodrich and Hambro, *Charter of the United Nations, Commentary and Documents* (2nd rev. ed., 1949), p. 517.

the United Nations distinguishes the rule from that contained in the Covenant by referring to the former as 'relative invalidation' and the latter as 'absolutely non-valid'.[1] This use of the word 'relative' may be taken to mean that the 'invalidation' does not penetrate into the sphere of general international law. However, it may be doubted whether the word 'invalidation' truly represents the legal consequences of non-registration. Thus it would appear that the rule is really limited to given legal situations, and that consequently it is not strictly accurate to refer—as has been done here for convenience throughout—to the 'sanction' in paragraph 2 of Article 102.[2]

In this connexion it is perhaps most convenient to show what situations the rule does *not* apply to. In the first instance, it is clear that a non-registered treaty which has entered into effect prior to the coming into force of the Charter may be invoked by any party thereto either before an organ of the United Nations[3] or before any other international body or tribunal. This follows from the fact that Article 102 is mandatory with regard to treaties entered into after the coming into force of the Charter, but only permissive with regard to treaties entered into before such time. The latter category of treaties may be 'filed and recorded' under Article 10 of the registration regulations.[4]

Secondly, it is only the *parties* to a non-registered treaty susceptible of registration who may not invoke it before an organ of the United Nations. Any other state not a party to the treaty is at liberty to invoke it. It is not difficult to conceive of a case where this may happen. Thus, Member state A and Member state B enter into a treaty by which state A agrees to grant

[1] Kelsen, *The Law of the United Nations* (1950), p. 722.

[2] It is nevertheless noteworthy that the Colombian representative in Committee IV/2 at San Francisco considered that paragraph 2 of Article 102 had a definite penal aspect. Thus, in discussing the question as to whether registration should be limited to those treaties which had entered into effect after the coming into force of the Charter, he said that only the registration of future treaties should be contemplated, on the ground that the sanction could not be retroactive, in accordance with the 'well known principle of penal law'. *U.N.C.I.O. Documents*, vol. 86, p. 25.

[3] Paragraph 1 of Article 7 of the Charter provides that the principal organs of the United Nations are the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice, and Secretariat. Paragraph 2 provides for the establishment of subsidiary organs. As on 1 January 1953 there were about 50 such organs.

[4] Article 10 reads as follows:

'The Secretariat shall file and record treaties and international agreements, other than those subject to registration under article 1 on these regulations, if they fall in the following categories:

(*a*) Treaties or international agreements entered into by the United Nations or by one or more of the specialized agencies;

(*b*) Treaties or international agreements transmitted by a Member of the United Nations which were entered into before the coming into force of the Charter, but which were not included in the treaty series of the League of Nations;

(*c*) Treaties or international agreements transmitted by a party not a member of the United Nations which were entered into before or after the coming into force of the Charter which were not included in the treaty series of the League of Nations, provided, however, that this paragraph shall be applied with full regard to the provisions of the resolution of the General Assembly of 10 February 1946 set forth in the Annex to these regulations.'

in its territory to the nationals of state B most-favoured-nation treatment. This treaty is registered. State A then enters into a treaty with another Member, state C, in which each mutually agrees to accord to the nationals of the other in their respective territories treatment in accordance with the principles of international law. This treaty is not registered. State B subsequently alleges that its nationals are not receiving in the territory of state A treatment in accordance with the principles of international law. To support this claim state B is entitled to invoke before any organ of the United Nations (or before any other international body or tribunal), in so far as this is compatible with the general rule *res inter alios acta*, the non-registered treaty entered into between state A and state C.

Equally, it would appear that any organ of the United Nations may itself take cognizance of a non-registered treaty.[1] Thus it is submitted that the International Court of Justice when confronted with the interpretation of a disputed provision of a registered treaty could, indeed, on its own initiative, take notice of another but non-registered treaty entered into between the parties to the dispute before the Court.[2] Similarly, in the words of Goodrich and Hambro: 'It would, for example, appear to be possible for the Security Council in the performance of its functions to take account of such a treaty or agreement on its own initiative.'[3]

Thirdly, as has been already indicated by implication, there is nothing in the language of Article 102 to preclude a party to a non-registered treaty susceptible of registration, or any other state, from invoking it before an international body or tribunal, other than an organ of the United Nations. Such a treaty could be invoked, for example, before a tribunal of the Permanent Court of Arbitration, or before an Arbitral Commission created *ad hoc*. Moreover, it would seem that such a treaty might also be invoked before a body or tribunal contemplated in the Charter which is nevertheless not an 'organ' of the United Nations.[4] The fact that paragraph 2 of Article 102 merely prevents the invoking of a non-registered treaty before an organ of the United Nations is a clear illustration of the limited effect of the rule laid down in the paragraph. Furthermore, it shows that the rule is open in this respect to the same criticism as was levelled against one of the theories regarding the legal consequences to be attached to Article 18 of the Covenant,[5] namely, that one court will regard a treaty as valid, but that in another a party raising the same treaty will be deprived of his remedy. However, this is not an anomaly as serious as might appear at first sight

[1] See Kelsen, op. cit., p. 722. Cf. U.N. Doc. A/CN. 4/63, p. 213.

[2] See Oppenheim, op. cit., p. 828, footnote 3, where this very problem is posed.

[3] Goodrich and Hambro, *Charter of the United Nations* (2nd rev. ed., 1949), p. 517.

[4] Goodrich and Hambro make the point that '. . . the use of the term "before any organ of the United Nations" [in paragraph 2 of Article 102] suggests the possibility that such a treaty or agreement can actually be invoked by one of the parties before a special arbitral tribunal set up under the terms of Articles 33 or 52 of the Charter'; ibid.

[5] See p. 187, *supra*.

since there is nothing to prevent a party intending to bring a dispute before the International Court, and to rely upon a particular treaty concluded either with the other party to the dispute or with a third party, from registering such treaty.[1]

Fourthly, the rule can have no application to multilateral treaties of which the Secretary-General is the depositary, since the registration of such treaties takes place *ex officio*, under Article 4 (*c*)[2] of the registration regulations, upon the date of their entry into force. Neither will it apply to trusteeship agreements, which likewise are now registered *ex officio* upon their date of entry into force.[3] Similarly, it will not apply to Declarations of Acceptance of the Optional Clause of Compulsory Jurisdiction of the International Court of Justice, made by states under Article 36, paragraph 2, of the Statute of the Court. Such declarations, in the light of the interpretative statement to be found in the Report of Committee IV/2 at San Francisco that

> 'The word "agreement" [in Article 102] must be understood as including unilateral engagements of an international character which have been accepted by the State in whose favour such an engagement has been entered into,[4]

have been considered by the Secretariat as falling within the category of 'unilateral engagements' for the purposes of registration.[5] Under Article 36, paragraph 4, of the Statute, these declarations are required to be deposited with the Secretary-General. The practice has now developed of registering them *ex officio* on the date of such deposit. Thus it will be seen that in the case of all these treaties there clearly cannot exist *any* parties thereto until the date of their entry into force, upon which date they are registered—whereas, in the case of any other multilateral or bilateral treaty, registration may, but will not necessarily, take place upon the date of its entry into force, which is the date upon which the states who have entered into it become parties thereto.

It has been suggested so far that the rule in paragraph 2 of Article 102 has no application to certain legal situations. It may now be appropriate to discuss a question which, if established affirmatively, would tend to enlarge

[1] The most important question which might arise is whether the registration had proceeded in accordance with the provisions of paragraph 1 of Article 102 from the point of view of the time factor. Upon this matter see above, p. 195.

[2] See General Assembly Resolution 364 (IV), U.N. Doc. A/1251, p. 63.

[3] E.g. Trusteeship Agreement for the Territory of the Nauru, *United Nations Treaty Series*, vol. x, p. 3. The basis for *ex officio* registration of the trusteeship agreements under Article 4 of the registration regulations, is, however, not entirely clear. Under this Article it must either be because the United Nations is considered to be a party thereto, or because the United Nations has been authorized therein to effect such registration. The agreements so far registered contain no such authorization. Schachter, in this *Year Book*, 25 (1948), at p. 130, sees 'an implied authorization' in the agreements for the registration. Parry, on the other hand, in this *Year Book*, 27 (1950), at p. 180, assumes that the basis for the latter 'must have been an opinion that [the agreements] were instruments to which the United Nations is a party'.

[4] *U.N.C.I.O. Documents*, vol. 13, Commission IV, p. 705.

[5] To this effect see note by the Secretariat, *United Nations Treaty Series*, vol. i, p. xvi.

the scope of the paragraph. Thus it is clear from its terms that the sanction only applies when the treaty 'has not been registered in accordance with the provisions of paragraph 1 of this Article'. The procedure for complying with the provisions of paragraph 1 is laid down in the registration regulations. It follows that any treaty whose registration has not proceeded in accordance with the requirements of these regulations will be affected by the sanction. However, the regulations do not attempt to lay down precise stipulations with regard to one important element contained in paragraph 1 of Article 102, namely, that every treaty shall be registered 'as soon as possible'. This point now demands attention.

III. *Is there a time limit for registration?*

Before attempting to arrive at any conclusions concerning the question whether there is a time limit for registration, which if established would certainly increase the importance of the sanction for non-registration, it may be pertinent to survey the discussions which have taken place on the subject at San Francisco and subsequently. The Representative of Australia in Committee IV/2 at San Francisco raised the question of the effect of the sanction upon a treaty which was not registered 'as soon as possible', in accordance with the requirements of paragraph 1 of Article 102. He inquired whether a party to a treaty which had not been registered could put itself into a position to invoke it by registering 'at any time'.[1] It was, in his opinion, desirable that the matter should be settled by a further provision in paragraph 2 of Article 102, in order to avoid the situation where a party who had not registered a treaty for some years after the date of its conclusion, and who then desired to register it, would be met by the answer that it was then too late to do so. He therefore proposed, in order to clarify the issue, that the following sentence be added to the draft paragraph 2:

> 'It is understood that a party to a treaty or an agreement which has not previously been registered will be able, by registering it at any time, to put himself in a position to invoke it before the organization.'[2]

The Representative of France, arguing against this proposal, suggested that if any party to a treaty could escape the sanction imposed by reason of non-registration, 'just by appearing at any given moment',[3] then the words 'as soon as possible' would be rendered absolutely meaningless. The Representative of the United States agreed with this latter view. He added that whilst there was of course an area of factual determination as to what constituted 'as soon as possible', unexcused delay, or delay beyond a relatively short period of time, could not be conceived of as coming within the scope of the term.[4] Furthermore, it was felt by the Committee that

[1] Verbatim Minutes of Eleventh Meeting of Committee IV/2, *U.N.C.I.O. Documents*, vol. 87, pp. 15–16.

[2] Ibid.

[3] Ibid., p. 17.

[4] Ibid., p. 30.

the change from the term 'forthwith', which appeared in Article 18 of the Covenant, to 'as soon as possible' already provided sufficient flexibility. It was decided therefore not to adopt the Australian proposal. This, it is submitted, was the right decision. The Australian proposal, if adopted, would have taken the 'teeth' out of the sanction.

During the discussion, the Representative of India made the suggestion that the organ of the organization before which a treaty was invoked should possess a discretion to decide whether it had been registered 'in time'. In view of the fact that the phrase 'no party to any such treaty which has not been registered may invoke that treaty', implied that there was no such discretion, he submitted for consideration the following substitute text, which he felt might succeed in indicating that an organ of the organization always possessed the discretion: 'No party shall be entitled as of right to invoke. . . .'[1] In support of this proposal the view was advanced that it was 'desirable to encourage even belated registration',[2] and that, moreover, in the case of a treaty which had entered into force some thirty years previously, but had not been registered until twenty years after, it would be embarrassing for the International Court of Justice, as the principal judicial organ of the United Nations, to deny validity to such a treaty. On the other hand, the majority of the members of the Committee were of the opinion that the question was a larger one than that of possible embarrassment to the Court. Thus it was felt that 'the basic purpose of the obligation was to prevent secret treaties, and that any provision derogating from the obligation to register promptly would be seriously at odds with that purpose'.[3] The Indian suggestion was therefore not adopted.

Notwithstanding this decision, the fact remains that any organ of the Organization may be faced with the hypothetical situation envisaged by the Committee, in which case it will clearly be obliged to make a factual determination as to whether the treaty concerned has been registered 'as soon as possible'[4] or not; in other words it will still possess the discretion which the Indian Representative wished to give it. It is submitted therefore that the only effect of the Indian amendment would have been to raise a slight presumption in any particular case that the registration in question had not complied with the requirements of paragraph 1 of Article 102.

This question of the effect of the words 'as soon as possible' was raised again in the Sixth Committee of the Second Session of the General Assembly during the discussion of the Secretary-General's report on the registration of treaties.[5] The Chairman of the Committee (the Representative of Syria) reverted to the fear voiced in Committee IV/2 at San Francisco

[1] *U.N.C.I.O. Documents*, vol. 87, p. 26.

[2] Ibid., vol. 13, Commission IV, p. 628.

[3] Ibid.

[4] It may be noted that these words are retained in their context in Article 1, paragraph 1, of the registration regulations.

[5] U.N. Doc. A/380.

that a treaty 'might be registered only a short time before being invoked by the Government concerned which would have followed the registration procedure only for the purpose of being able to invoke the given treaty'.[1] He therefore suggested that it might be advisable to set a time limit for registration. Possibly the better argument in support of a time limit would have been that, without such time limit, a treaty could be registered, for example, ten years after the date of its entry into force, which on a factual determination might not seem to be 'as soon as possible', and then immediately invoked. The mere fact that a treaty has been registered only a 'short time' before being invoked is immaterial. Thus a state may quite properly register a treaty shortly before it invokes the terms thereof. The fact that the act of invoking follows closely upon the act of registration has no bearing upon the question whether the requirement of registration 'as soon as possible' has been complied with. Moreover, it is submitted that the Representative of the United Kingdom was correct in pointing out that any specification of a time limit would be *ultra vires* the terms of Article 102.[2]

During the discussion referred to above, the Representative of the U.S.S.R. drew the attention of the Committee to the fact that the Russian text of Article 102 used the words 'at the earliest possibility', and that consequently governments were allowed to appraise that possibility. In his view, if a government considered that a treaty would not subsequently be invoked before an organ of the United Nations, then there was no necessity for registration.[3] This interpretation takes no account of the basic reason and purpose underlying the whole notion of registration, namely, the avoidance of secret pacts. Moreover, it does not seem reasonable to limit the obligation contained in paragraph 1 of Article 102 by the sanction to be found in paragraph 2 thereof. This opinion was expressed by the majority of the speakers in the Sixth Committee. In the words of the Representative of the United States:

'. . . it was clear that under the paragraph 1 of Article 102 there existed an obligation to register every international agreement and treaty; that obligation was in no way diminished by the sanction provided in paragraph 2 of Article 102. The United States of America considered that obligation to be absolute. In the Charter there were many instances of obligations not accompanied by sanctions, a fact which did not diminish the validity of those obligations.'[4]

It may be admitted that if a time limit for registration had been set in paragraph 1 of Article 102, this would have served to increase the scope of the sanction in paragraph 2. On the other hand, the fact that there is no such time limit, and that the phrase 'as soon as possible' is not susceptible to precise *a priori* interpretation, does not mean necessarily that the scope

[1] *United Nations, Official Records of the Second Session of the General Assembly, Sixth Committee*, p. 123.

[2] Ibid. [3] Ibid., p. 124. [4] Ibid., pp. 119–20.

of the sanction is on this account restricted. It would appear that in each instance the organ concerned will have to arrive at its own decision regarding the compliance or non-compliance of a treaty with the letter and spirit of paragraph 1.

IV. *The meaning and scope of the term 'invoke'*

So far throughout this study the term 'invoke' has been used without any attempt to construe its meaning in the particular context of paragraph 2 of Article 102. Although it would not be feasible to attempt a precise definition of the term, an inquiry into its general meaning and scope is necessary for the purpose of arriving at some conclusions regarding the legal effect of the paragraph. The *travaux préparatoires* of San Francisco afford no clue as to the exact meaning of the term. In fact, those responsible for the drafting of the paragraph seem to have been under the impression that its meaning was unequivocal and accepted, and therefore in no need of interpretation. *The Concise Oxford Dictionary*[1] gives as its primary meaning: to 'call on', and as secondary meanings: to 'summon', and to 'ask earnestly for'. The French version of the Charter uses the term 'invoquer', which the *Nouveau petit Larousse* interprets to mean 'appeler à son aide'.[2] Dalrymple, in his *French–English Dictionary of Legal Words and Phrases*, translates it as 'to cite (a witness to appear on one's behalf)'.[3] The latter interpretation in the context of paragraph 2 of Article 102 would appear to be far too strict. Thus a reference to a non-registered treaty to elucidate an argument presented by a state party to that treaty on a matter under discussion in one of the organs cannot be considered as an act coming within the scope of the paragraph. The citing of such a treaty in debate before an organ must be carefully distinguished from cases where a party relies upon a treaty as the foundation of its claim (or counter-claim or defence), or where the particular legal right which it alleges has been infringed finds its basis in the terms thereof. The latter only, it is submitted, can properly be considered as acts of invoking.

This distinction may be illustrated by an example taken from the *Corfu Channel* case before the International Court of Justice. In the Memorial and the Reply submitted by the United Kingdom frequent reference was made to the Agreement of 22 November 1945 between the United Kingdom, the United States of America, France, and the U.S.S.R., concerning mine clearance. That Agreement was undoubtedly an international agreement which is susceptible to registration under paragraph 1 of Article 102, in that it was concluded after the entry into force of the Charter. It had not, however, been registered on 1 January 1953 by any of the Member states

[1] *The Concise Oxford Dictionary* (4th ed., 1950), p. 629.
[2] *Nouveau petit Larousse* (1948), p. 543.
[3] Dalrymple, *French–English Dictionary of Legal Words and Phrases* (1948), p. 76.

parties thereto. The question therefore arises whether its use by the United Kingdom in the written proceedings before the Court constituted the act of invoking within the meaning of paragraph 2 of Article 102.

Reference to the Agreement was essential in that the North Corfu Channel was declared to be once again an international highway by reason of the operations conducted under the Agreement. It was necessary also to refer to the international bodies created by the Agreement in their relation to the sweeping operations in the channel. However, it is difficult to regard these references to the Agreement as exceeding what was required for an adequate presentation of the facts. Indeed, the Agreement may be considered in its true perspective as constituting an essential link in the chain of the historical narrative put before the Court. It in no sense formed the *legal basis* of the United Kingdom's case. Thus it would appear that no act of invoking was involved. At the same time it would seem that the citing of the Agreement, in the manner in which it was done in that case, probably constitutes a good example of the extent to which a state may draw the attention of the International Court to the existence of a non-registered treaty without actually 'invoking' it.

A further example may now be given of an act which might be considered as falling within the scope of what is proscribed under paragraph 2 of Article 102. Thus, on 25 March 1948, immediately after the delivery of the judgment of the International Court on the Preliminary Objection in the *Corfu Channel* case concerning jurisdiction, the Court was notified of a Special Agreement, which had been concluded between the two parties a few hours before the delivery of the judgment, as a result of the Resolution of the Security Council of 9 April 1947, for the purpose of submitting to the Court for decision the two questions set out therein.[1] There can be no doubt that this Special Agreement constituted an international agreement within the meaning of paragraph 1 of Article 102. The Agreement was not registered on 25 March 1948, and the question arises therefore as to whether it was 'invoked' by the United Kingdom or Albania in submitting it to the Court in order that it might form the basis of the further proceedings in the case. The answer would appear to be that clearly neither of the parties in submitting the Agreement was purporting to base its legal rights with regard to the facts in issue upon the terms thereof. The Agreement was entered into for the sole purpose of giving the Court jurisdiction. The joint act of submission to the Court therefore did not amount to invoking.[2]

[1] *Corfu Channel* case, *I.C.J. Reports, 1949*, p. 6.

[2] It is interesting to note that the Permanent Court of International Justice exercised jurisdiction in a number of cases where such jurisdiction was based upon a non-registered special agreement between the parties, members of the League, notably in the *Mavrommatis Palestine Concessions* case. See Hudson in *American Journal of International Law*, 28 (1934), pp. 546–52, at p. 552.

As to the extent to which a state may be prevented from invoking a non-registered treaty in any particular case, it is submitted that the sanction must be considered as applying to the non-registered treaty in all proceedings before an organ of the United Nations which are related to the initial act of invoking taken by the party concerned, and which form part of the same legal case or claim. Thus, if a party to a non-registered treaty invokes it before an organ and is then notified by an official decision of that organ that no cognizance can be taken of the treaty on account of its non-registration, it is submitted that such party is barred from relying on the terms of the treaty before that organ, during its determination of the particular case. A party cannot be permitted to register the treaty on being informed that no cognizance can be taken thereof, and then invoke it as a legal basis for the same claim or case, before the same organ. Moreover, this is not merely registration which is 'too late' within the context of paragraph 1 of Article 102, since the requirement of registration 'as soon as possible' is immaterial in these circumstances. The sanction therefore is to be regarded as constituting more than a mere procedural device. It has a substantive effect in that once an organ has rendered a decision that non-registration of a treaty has defeated the claim of a party thereto, then this is *res judicata* in so far as that organ is concerned.

However, if such is the effect to be attributed to a decision of the Security Council in a particular case, it would not prevent the party from registering the treaty and then invoking it as the basis of a new claim, albeit on the same facts, before the International Court of Justice. This must follow from the fact that, as has already been shown, it may not be entirely correct to refer to the effect of paragraph 2 of Article 102 as that of a 'sanction', and that its provisions cannot properly be regarded as having penal aspects. To debar a party from invoking a registered treaty before the International Court on the ground that another organ of the United Nations had previously refused to take cognizance of the treaty on account of its non-registration at the time of the act of invoking before that organ, would constitute a result in contradiction to the fundamental purpose of Article 102 as a whole, since it would serve to discourage registration.

Reference has been made in the present discussion to a 'decision' of an organ of the United Nations, where a party has invoked a non-registered treaty before that organ. This term has been used to illustrate the fact that the provisions of paragraph 2 of Article 102 cannot operate *in vacuo*, and that they have the effect of preventing a party from relying on a non-registered treaty only where such party actually attempts to invoke it. As a matter of practice, it may be doubted whether any party to a non-registered treaty, who intended to bring a case before an organ of the United Nations based upon such treaty, would attempt to do so without

registering it beforehand.[1] Admittedly, the question of compliance with the time factor and with the requirements of the registration regulations might be raised before the organ by the other party or parties to the case, but, as has already been shown, this would need to be resolved by a factual determination by the organ concerned, and would be preferable, from the viewpoint of the plaintiff state, to being prevented from invoking or relying on the terms of the treaty at all.

V. *Effect of the sanction upon treaties concluded by states not Members of the United Nations*

Under the system of registration instituted under Article 18 of the Covenant, one of the most important questions concerned the scope of the sanction contained in that Article in its application to treaties concluded between Member and non-member states of the League. A similar question arises in connexion with paragraph 2 of Article 102. The Report of the Rapporteur of Committee IV/2 at San Francisco contains the following statement with regard to the general scope of paragraph 2 of Article 102:

> 'This provision also covers treaties and agreements to which both members and non-members are parties. It is open to the latter to have such treaties or agreements registered. Moreover, it is necessary that they should be able to do so, seeing that their right to invoke the treaty or agreement before an organ of the Organization is made subject to registration.'[2]

It is clear that this statement does not relate to a treaty concluded between two non-members. Such a treaty does not come within the scope of paragraph 1 of Article 102, and therefore cannot be affected by the sanction. It can, nevertheless, be 'filed and recorded', in the same way as treaties concluded by Member states before the entry into force of the Charter.[3] With regard to the question of the registration of treaties concluded between Members and non-members it would appear to follow from the principle *pacta tertiis nec nocent nec prosunt* that no *obligation* for such registration devolves upon non-members, although Members remain bound by the provisions of the Charter in this respect. On the other hand, Kelsen in his *Law of the United Nations* suggests that since paragraph 2 of Article 102 'applies not only to treaties concluded by Members but also to treaties concluded by Members with non-members',[4] such application 'might be justified by the assumption that the obligation to register treaties

[1] It may be mentioned in this connexion, however, that the International Court has never queried as to whether a treaty invoked before the Court and susceptible to registration has in fact been registered. If the practice were adopted whereby the Registrar would inquire of the Secretary-General in such cases, an addition to the Rules of Court might be necessary.

[2] *U.N.C.I.O. Documents*, vol. 13, Commission IV, p. 706. See also the comment in the revisions to the draft registration regulations recommended by the United States, *United Nations, Official Records of the Second Part of the First Session of the General Assembly, Legal Questions*, p. 190, footnote 3.

[3] See p. 192, n. 2, *supra*.

[4] Op. cit., p. 722.

is, under Article 2, paragraph 6,[1] to be considered as an obligation imposed —indirectly—also upon non-members'.[2]

It is submitted that the conclusion to be drawn from the fact that paragraph 2 applies to treaties concluded between Members and non-members, and that the rights of the latter under such treaties are affected by the sanction, is that non-members are empowered, or at liberty, to register such treaties, but are not obligated to do so. The position of non-members is sufficiently protected by their being permitted to register treaties whose non-registration may adversely affect their rights thereunder, without any need for the imposition of an obligation. The situation is therefore similar to that which obtained under the League system.[3] At the same time, it is clear that if non-members were not permitted to register a treaty entered into with a Member, the former would be at a great disadvantage since, as will be submitted, the Member then would be able to prevent the invoking of the treaty before an organ of the United Nations merely by refraining from registration.[4] Indeed, in order to avoid any such suggestion the revisions to the draft registration regulations recommended by the United States contained an express provision allowing the registration by a non-member of a treaty concluded with a Member.[5]

It is now necessary to return to the main question under discussion, namely, how far non-members may be affected by paragraph 2 of Article 102. Thus, a non-member concludes a treaty with a Member, which the latter does not register. The former wishes to invoke the treaty before the International Court. Is it necessary that it should proceed to register the treaty in order to do this, or can it successfully raise the plea that Article 102 is *res inter alios acta* and that, since the treaty has been validly concluded and is binding under general international law, it can be invoked notwithstanding its non-registration? At first sight, at least, it would seem that the second alternative represents the correct legal position. Moreover, the ruling in the *Pablo Najera* case would appear to be of persuasive effect in this respect, in that it was held there that it was impossible to interpret Article 18 of the Covenant as constituting the application of a general rule of international law. However, the effect of the decision in that case was that the absence of registration could not be relied upon by a non-member of the League to evade its international obligations, and that the non-registered treaty was still binding in international law. In the present discussion, the binding validity of the non-registered treaty is not at issue, and

[1] Article 2, paragraph 6, of the Charter reads as follows: 'The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.'

[2] Op. cit., p. 722.

[3] See p. 189, n. 2, *supra*.

[4] See U.N. Doc. A/C. 6/56. In such a case the International Court would be unable to prevent the Member from gaining advantage from its own wrong.

[5] Ibid.

there could be no dispute as to whether the treaty could be invoked by the non-member before any international tribunal other than an organ of the United Nations. It is suggested that the *Pablo Najera* case does not in fact uphold the contention that the registration of the treaty by the non-member is not necessary for the purpose of invoking it before the International Court. The mere fact that the non-registered treaty is binding under general international law (as was held in the *Pablo Najero* case) is not in itself sufficient to enable it to be invoked before an organ of the United Nations.

Furthermore, it is submitted that a non-member state could not be heard to plead that it was ignorant of the effect of paragraph 2 of Article 102 upon the rights of the other party to the treaty, namely, the Member state. It would seem permissible in these circumstances to apply the private law analogy of the doctrine of estoppel to the case. This would mean that the non-member by concluding a treaty with a Member of the United Nations must be held to have known that, even if the sanction for non-registration did not have the character of limiting the juridical capacity of the Member, it nevertheless prevented *both parties* from invoking the treaty before the International Court (or before any other organ of the United Nations). The opening words of paragraph 2 of Article 102, namely, '*No party* to . . .', are explicit. Moreover, since the non-member is at liberty to register a treaty concluded with a Member, it may also be argued that there is no reason why it should be able to invoke such a treaty without registration, whereas the Member is obliged to proceed to registration. It may therefore be concluded that it is necessary for a non-member to register a treaty concluded with a Member in order to invoke it before the International Court. It follows that the Court (or any other organ of the United Nations) would refuse to apply a non-registered treaty to which a non-member and a Member are parties, notwithstanding that the treaty is 'binding' and valid under general international law.[1]

VI. *Conclusions*

The conclusions reached in the foregoing discussion may be summarized in the following propositions:

1. A non-registered treaty is valid under general international law and is binding upon the states parties thereto.

2. A treaty which has entered into effect prior to the coming into force of the Charter may be invoked by any party thereto either before an organ of the United Nations or before any other international body or tribunal.

3. Any state not a party to a non-registered treaty may invoke it before an organ of the United Nations, and any such organ may on its own initiative take cognizance of it.

[1] Cf. Kelsen, op. cit., p. 723.

4. A non-registered treaty may be invoked by any party thereto, or by any other state, before any international body or tribunal other than an organ of the United Nations.

5. The question whether a treaty has complied with the requirements of paragraph 1 of Article 102 from the standpoint of having been registered 'as soon as possible' will depend upon a factual determination in each case by the organ of the United Nations before which a party thereto purports to invoke it.

6. A non-registered treaty may be cited or referred to before an organ of the United Nations by a party thereto by way of elucidating an argument or point of view. Such a treaty, however, may not be made the legal basis of a case or claim presented by a party before an organ.

7. A treaty which has been registered may not be invoked by a party thereto before the same organ of the United Nations which has refused to take cognizance of such treaty, in the same case, on account of previous non-registration. Such a registered treaty may, however, be invoked before another organ.

8. A non-member state of the United Nations is not obliged to register treaties concluded with a Member. It is, however, at liberty to do so.

9. A non-member is obliged to register a treaty concluded with a Member which the latter has not registered in order to be entitled to invoke it before an organ of the United Nations.

EXCHANGES OF NOTES[1]

By J. L. WEINSTEIN, B.A., B.C.L. (OXON), LL.M. (HARVARD)

I. *Exchanges of notes in the practice of governments*

IN municipal law the normal procedure for the formulation of a contract is, apart from oral contracts, for the consensus of the parties to be recorded in writing in a single instrument formally expressing their common intention. It is equally possible for such a contract to be formed by an offer of one party being accepted by the other. In international law agreements have usually been effected by the first of these methods—that of the 'treaty' or 'convention'[2]—whilst an exchange of notes has followed closely the pattern of the second, namely, of an offer—perhaps counter-offer (for there may be a series of notes exchanged before agreement is reached)—and acceptance. An exchange of notes has been described as being composed in form of two unilateral instruments, each emanating from a state, but each bound to the other by the process of exchange[3]—a clear analogy to 'offer and acceptance' of municipal law.[4]

Throughout this article the term 'exchange of notes' is used to denote an 'exchange of letters', an 'exchange of correspondence', or an 'exchange of communications'. The form of these instruments is identical, and the terms are used interchangeably, often within the same instrument,[5] by writers and by the Secretariat of the United Nations.[6] While instances of agreements described by the parties as an 'exchange of correspondence'[7] or an 'exchange of communications'[8] are rare, and 'exchange of letters' is used more frequently for the conclusion of inter-departmental agreements,[9]

[1] This article was prepared by the writer while engaged in research in the University of Cambridge under a Humanitarian Trust Studentship awarded by the University. The writer desires to express his grateful acknowledgement to the Trustees of the Humanitarian Trust Fund.

[2] And similar instruments.

[3] See Basdevant *in Hague Academy, Recueil des Cours*, 15 (1926) (v), p. 610.

[4] This is particularly well illustrated where the exchange of notes is in the form of two declarations, as in that of 11 April 1923 between Norway and Portugal: *League of Nations Treaty Series* (hereinafter cited as *L.N.T.S.*), 16 (1923), p. 379.

[5] E.g. Exchange of Notes of 18 February 1925 between Belgium and Great Britain: *L.N.T.S.* 33 (1925), pp. 341 and 361, of 25 July 1949 between Belgium and Argentina: *United Nations Treaty Series* (hereinafter cited as *U.N.T.S.*), 46 (1950), p. 103; and of 16 May 1951 between the United Kingdom and Italy: (British) *Treaty Series*, No. 52 (1951), Cmd. 8291.

[6] E.g. *U.N.T.S.* 16 (1948), p. 215, and ibid. 35 (1949), pp. 232 and 324.

[7] E.g. Exchange of Correspondence of 25 August, 12 and 26 September 1927 between Luxembourg and Norway: *L.N.T.S.* 68 (1927), p. 37.

[8] E.g. Exchange of Communications of 17 April, 22 May, 22 and 27 July, and 24 October 1942 between the United States and Mexico: *U.N.T.S.* 21 (1948), p. 189.

[9] E.g. Exchange of Letters of 22 January and 20 March 1946 between the Netherlands and the United States, represented by their respective Secretaries of Finance: ibid. 3 (1947), p. 37; of 17 October and 18 November 1947 between Pakistan, represented by the Deputy Secretary to the Ministry of Communications, and Burma, represented by the Additional Secretary to the

it is difficult to formulate any clear differentiation between these four instruments.[1]

As a rule, the notes are drawn up in identical or similar terms,[2] *mutatis mutandis*, and exchanged between high officials, usually the Minister for Foreign Affairs of the one state and the resident diplomatic representative of the other; and they will be signed by those authorized to do so.[3] However, a practice, never widely adopted, developed during the era of the League of Nations of such notes being in the form of *notes verbales*. These were unsigned documents[4]—sometimes stamped with the seal of a Foreign Office or Embassy[5]—and were phrased in a more impersonal manner than is customary in exchanges of notes.[6] Apart from these features there is no clear distinction between an exchange of notes composed of *notes verbales* and one composed of ordinary notes. The range of subject-matter of *notes verbales* is equally unrestricted; they are occasionally used for the conclusion of inter-departmental agreements;[7] and they are sometimes subject to ratification.[8] In recent years a development of the *note verbale*—although the parties still, on rare occasions, use the latter title expressly[9]—has been the use of notes which, though not termed *notes verbales*, are identical in form.[10] These are in some cases unsigned,[11] and in others

Transport and Communications Department: ibid. 35 (1949), p. 323; and of 1 September 1951 between the United Kingdom, represented by an official of the Board of Trade, and Cuba, represented by a member of a Cuban Trade Delegation: (British) *Treaty Series*, No. 78 (1951), Cmd. 8382.

[1] The use of the words 'correspondence' and 'communication' by a party referring to a 'note' or 'letter' is common, e.g. Exchange of Notes of 7 July, 28 August, 5 October, and 26 November 1937 between Hungary and Norway: *L.N.T.S.* 183 (1937–8), p. 81; of 22 and 24 March 1948 between the United States and Venezuela: *U.N.T.S.* 44 (1949), p. 57; and of 14 June 1947 between the United Kingdom and Italy: (British) *Treaty Series*, No. 47 (1947), Cmd. 7158.

[2] Sometimes one party will request a Note in *identical* terms: e.g. Exchange of Notes of 3 November 1925 between Portugal and Great Britain: *L.N.T.S.* 47 (1926), p. 379; sometimes in *similar* terms, e.g. Exchange of Notes of 18 February 1925 between Belgium and Great Britain: ibid. 33 (1925), p. 341; sometimes in *corresponding* terms, e.g. Exchange of Notes of 10 and 11 April 1925 between Canada and Spain: ibid. 43 (1926), p. 333. More commonly references of this sort are omitted, e.g. Exchange of Notes of 24 and 28 July 1947 between Canada and Greece: *U.N.T.S.* 43 (1949), p. 111.

[3] As to the question of full powers and authorization, see below, p. 208.

[4] E.g. Exchange of Notes of 20 and 28 February 1922 between Germany and Finland: *L.N.T.S.* 19 (1923), p. 81.

[5] E.g. Exchange of Notes of 17 and 19 September 1931 between Spain and Hungary: *L.N.T.S.* 124 (1931–2), p. 353.

[6] E.g. Exchange of Notes of 28 June 1926 between Germany and France. Here a *note verbale* from the German *Ministry* of Foreign Affairs is addressed to the French *Embassy*: ibid. 53 (1926), p. 435.

[7] E.g. Exchange of Notes of 17 August and 16 November 1949 between Belgium and Canada: *U.N.T.S.* 45 (1950), p. 3.

[8] E.g. Exchange of Notes of 25 November 1925 between Germany and Estonia: *L.N.T.S.* 54 (1926–7), p. 79.

[9] E.g. Exchange of Notes of 10 and 28 June and 12 July 1949 between the United States and Austria: *U.N.T.S.* 84 (1951), p. 291.

[10] They are sometimes termed *Notes* by the parties: e.g. Exchange of Notes of 21 January, 11 February, 5 and 13 March 1946 between the United States and the Netherlands: ibid., p. 3.

[11] E.g. Exchange of Notes of 17 November 1945 and 4 January 1946 between Denmark and France: ibid. 27 (1949), p. 169.

initialled[1] or stamped with a seal.[2] This, too, is a practice which is not widespread.[3]

There may be more than two states concerned in an exchange of notes, apart from cases where one state is acting on behalf of another,[4] as in the case of the Agreement concluded in 1951 between the United Kingdom, the United States, and Italy. Here, at the same time as the Exchange of Notes of 16 May 1951 between the United Kingdom and Italy,[5] Notes in similar terms were exchanged between Italy and the United States. These Notes together constituted an Agreement between the United Kingdom and the United States on the one hand and Italy on the other. Germany, represented by her Foreign Minister, concluded an agreement with the Principal Allied Powers, represented by the Conference of Ambassadors, by an Exchange of Notes of 16 and 17 December 1920.[6]

The modern development of international occupation and military authorities has given rise to the practice of notes being exchanged between these entities and states. Thus between the world wars agreements were concluded in this manner by the Saar Basin Governing Commission[7] and the Inter-Allied Rhineland High Commission.[8] Since 1945 agreements have been concluded by the Military Government of the French Zone of Occupation of Germany,[9] the Joint United States/United Kingdom Occupied Areas in Germany,[10] the French Zone of Occupation,[11] the Soviet Military Administration for Germany,[12] and the Allied High Commission for Germany.[13]

Similarly, the growth of international organizations[14] and the recognition

[1] E.g. Exchange of Notes of 10 and 30 April 1947 between the United States and Sweden: ibid. 84 (1951), p. 33.

[2] E.g. Exchange of Notes of 3 July 1947 between Belgium and Switzerland: ibid. 29 (1949), p. 277.

[3] See also the development in the use of exchange of *aides-mémoire* or memoranda, below, p. 215.

[4] E.g. Exchange of Notes of 23 August 1949 between Belgium, acting on behalf of herself and Luxembourg (together constituting the Belgo-Luxembourg Economic Union), and Chile: ibid. 46 (1950), p. 163.

[5] *Treaty Series*, No. 52 (1951), Cmd. 8294.

[6] *L.N.T.S.* 12 (1922), p. 39. See also Exchange of Notes of 8 January 1924 constituting an Agreement between Germany, France, and Great Britain on the one hand, and Norway on the other: ibid. 23 (1924), p. 63; and Exchange of Notes of 1, 26, and 28 February, 4 and 14 March, 22 June and 26 September 1929 constituting an Agreement between the United States, Canada, Cuba, and Newfoundland: ibid. 97 (1929–30), p. 301.

[7] E.g. with Germany of 7 and 20 June, 1 July 1921, and 19 and 26 August 1922: ibid. 27 (1924), p. 249.

[8] E.g. with Germany of 10 September 1926: ibid. 62 (1927), p. 141.

[9] E.g. with the United States of 9 July 1948: *U.N.T.S.* 32 (1949), p. 93.

[10] E.g. with the United States of 7 and 16 December 1948: ibid. 77 (1950), p. 85.

[11] E.g. with the United States of 16 December 1948 and 7 February 1949: ibid. 67 (1950), p. 189.

[12] E.g. with Norway of 29 December 1947: ibid. 30 (1949), p. 293.

[13] E.g. with the Federal Republic of Germany of 6 March 1951: *Treaty Series*, No. 86 (1951), Cmd. 8368.

[14] An unusual example of an exchange of notes between a state and a party which is an international organization is that of 26 June 1946 between the Netherlands, represented by the

of their legal personality has resulted in agreements being concluded by an exchange of notes between such organizations and states. Thus an Exchange of Notes of 21 November 1947[1] between the United Nations, represented by the Secretary-General, and the United States, represented by the senior United States Representative at the United Nations, brought into effect the Headquarters Agreement between the two parties in accordance with section 28 of that Agreement.[2] The large increase in the number of inter-departmental agreements[3] has also tended to modify the traditional practice as agreements of this kind do not pass through diplomatic channels.

Authorization to conclude agreements by exchange of notes is usually expressed by an introductory phrase such as that in the Exchange of Notes of 3 and 6 July 1931 between Austria and Brazil.[4] There the Note sent by the Austrian Minister in Rio de Janeiro to the Brazilian Minister for Foreign Affairs began as follows: 'I have the honour to inform Your Excellency that I have been authorised by my Government to conclude this agreement [*sic*] by way of exchange of notes on the following basis. . . .'[5] The authorization may, however, be in a more formal manner. Thus in the Exchange of Notes of 29 August 1925 between Estonia and Norway[6] the Norwegian Minister to Estonia wrote: 'I also enclose the Royal Full powers authorising me to proceed to the exchange of notes. . . .'[7] Another illustration is provided by the Exchange of Notes of 7 November 1946, 30 July and 8 August 1947 between Czechoslovakia and New Zealand.[8] Here the Consul-General of Czechoslovakia at Sydney stated that he had been appointed by the President of Czechoslovakia as his Plenipotentiary and invested with Full Power to conclude and sign the Agreement set out in the Notes. He enclosed a copy of his Full Power[9] in testimony of this signed by the President and countersigned by the Minister for Foreign Affairs. In the case of inter-departmental agreements, ministerial and departmental officers are regarded as *ipso facto*, by their offices and duties, competent to sign agreements on behalf of their governments,[10] although in most cases the authorization to conclude these agreements is expressed as in inter-governmental agreements.[11]

Minister for Foreign Affairs, and the International Court of Justice, represented by the President of the Court, in which the parties agreed that the question of precedence lay outside the scope of the Agreement relating to Privileges and Immunities of Members of the Court and Others: *U.N.T.S.* 8 (1947), p. 61.

[1] Ibid. 11 (1947), p. 11.
[2] Ibid., pp. 34–35.
[3] See below, p. 215.
[4] *L.N.T.S.* 123 (1931–2), p. 9.
[5] Ibid., p. 12.
[6] Ibid. 43 (1926), p. 25.
[7] Ibid., p. 26.
[8] *U.N.T.S.* 18 (1948), p. 161.
[9] Ibid., p. 166.
[10] Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), pp. 797–8.
[11] Occasionally there is no mention of authorization: e.g. Exchange of Notes of 17 and 25 August 1950 between the Netherlands and Luxembourg: *U.N.T.S.* 81 (1951), p. 13.

While there are many exchanges of notes which are described as constituting understandings,[1] *modi vivendi*,[2] *ad interim*[3] or provisional agreements,[4] or *pacta de contrahendo*,[5] the most commonly stated purpose is to constitute Agreements[6] or Arrangements.[7] This is so whether the agreement concluded is stated to be in acceptance of proposals made verbally;[8] in confirmation of an existing oral agreement[9] or of previous correspondence;[10] or the result of negotiations commenced by the notes themselves;[11] or as proof that an agreement has been reached;[12] or as serving to place on record an agreement already reached;[13] or as being an instrument giving legal validity to and constituting a formal agreement.[14] These formal descriptions do not alter the juridical nature of the exchange of notes. While the purpose of some exchanges of notes may require a particular description, it is impossible to differentiate between exchanges of notes which constitute Agreements and those which constitute Arrangements. The use of one description rather than the other is wholly a matter of choice; it is not based on the purpose of the agreement or its subject-matter.[15]

As there are no rules prescribing the form of exchanges of notes, so there are none prescribing the time at which agreements concluded in this

[1] E.g. Exchange of Notes of 18 February 1925 between Belgium and Great Britain: *L.N.T.S.* 33 (1925), p. 341.

[2] E.g. Exchange of Notes of 24 and 28 July 1947 between Canada and Greece: *U.N.T.S.* 43 (1949), p. 111.

[3] E.g. Exchange of Notes of 1 December 1921 between Spain and Norway: *L.N.T.S.* 9 (1922), p. 69.

[4] E.g. Exchange of Notes of 10 June 1924 between Lithuania and the Netherlands: ibid. 34 (1925), p. 373.

[5] E.g. Exchange of Notes of 15 and 16 February 1920 between Germany and Sweden: ibid. 2 (1920–1), p. 263.

[6] E.g. Exchange of Notes of 22 March, 23 April, and 3 May 1946 between New Zealand and Norway: *U.N.T.S.* 16 (1948), p. 211.

[7] E.g. Exchange of Notes of 4 March 1943 between the United States and Canada: ibid. 13 (1948), p. 411.

[8] E.g. Exchange of Notes of 18 and 19 December 1922 between the Netherlands and Roumania: *L.N.T.S.* 14 (1922–3), p. 191.

[9] E.g. Exchange of Notes of 23 March 1944 between the United Kingdom and Turkey: *U.N.T.S.* 2 (1947), p. 227.

[10] E.g. Exchange of Notes of 21 September 1926 between the Netherlands and Norway: *L.N.T.S.* 56 (1926), p. 89.

[11] This is the most common case.

[12] E.g. Exchange of Notes of 19 and 20 June 1921 between Spain and Sweden: ibid. 5 (1921), p. 387.

[13] E.g. Exchange of Notes of 17 and 19 December 1921 between Sweden and Switzerland: ibid. 9 (1922), p. 11.

[14] E.g. Exchange of Notes of 13 May 1925 between Norway and Great Britain: ibid. 36 (1925), p. 435.

[15] This view of the arbitrary nature of the choice is supported by the lack of consistency within a single instrument: e.g. Exchange of Notes of 2 May 1925 between the United States and Finland: ibid. 47 (1926), p. 351. In an Exchange of Notes of 21 July 1932 between Brazil and India, one party referred to the 'Arrangement' and the other party to the 'Agreement': ibid. 133 (1932), p. 93. The Secretariat of the League of Nations, in its translations of instruments published after registration, did not distinguish between the two terms: e.g. Exchange of Notes of 10 February 1925 between the United States and Poland: ibid. 37 (1925), p. 141.

manner shall become effective. In the absence of an express provision, when the date of the notes is the same[1] that date will be decisive for the purpose; when the dates are different the date of the later note will have that effect.[2] Usually express provision[3] is made for the agreement to take effect immediately.[4] But the operative date may be the date of the first note,[5] or the date of the last note which completes the exchange,[6] or some future date;[7] or it may have a retroactive effect.[8] The agreement may come into effect only after ratification by both parties,[9] approval by both parties,[10] ratification by one party,[11] approval by one party,[12] or a combination of ratification by one party and approval by the other.[13] It may come into operation only after some further act, such as an exchange of telegrams,[14] the dispatch of a telegram by one party,[15] the passing of municipal legislation,[16] the publication of the terms according to forms prescribed by the municipal law of the parties concerned,[17] the notification of its terms

[1] E.g. Exchange of Notes of 20 and 21 March 1950 between the United Kingdom and Italy: *Treaty Series*, No. 14 (1952), Cmd. 8502.

[2] E.g. Exchange of Notes of 1 and 3 July 1952 between the United Kingdom and Ethiopia: ibid., No. 46 (1952), Cmd. 8642.

[3] E.g. Exchange of Notes of 28 October 1926 between Germany and Denmark: *L.N.T.S.* 57 (1926), p. 185; and Exchange of Notes of 12 February 1952 between the United Kingdom and Italy: *Treaty Series*, No. 13 (1952), Cmd. 8493.

[4] It may take effect immediately but lapse if not ratified: e.g. Exchange of Notes of 13 July 1937 between the Union of South Africa and the Belgo-Luxembourg Economic Union: *L.N.T.S.* 182 (1937–8), p. 247.

[5] E.g. Exchange of Notes of 20 August 1952 between the United Kingdom and Yugoslavia: *Treaty Series*, No. 56 (1952), Cmd. 8681.

[6] E.g. Exchange of Notes of 8 January 1952 between the United Kingdom and the United States: ibid., No. 9 (1952), Cmd. 8480.

[7] E.g. Exchange of Notes of 19 and 21 April 1927 between Finland and Turkey: *L.N.T.S.* 58 (1926–7), p. 399; and Exchange of Notes of 18 May 1942 between Brazil and Uruguay: *U.N.T.S.* 54 (1950), p. 369.

[8] E.g. Exchange of Notes of 15 January 1923 between Germany and Spain: *L.N.T.S.* 26 (1924), p. 455; and Exchange of Notes of 25 March 1948 between Belgium and Luxembourg: *U.N.T.S.* 18 (1948), p. 323.

[9] E.g. Exchange of Notes of 17 April 1925 between Greece and Poland: *L.N.T.S.* 38 (1925), p. 30. For further examples see below, p. 224, n. 5.

[10] E.g. Exchange of Notes of 15 January 1931 between Estonia and Lithuania: ibid. 114 (1931–2), p. 141.

[11] E.g. Exchange of Notes of 14 September 1929 between Estonia and Turkey: ibid. 97 (1929–30), p. 365; and Exchange of Notes of 29 June 1948 between the United States and Denmark: *U.N.T.S.* 27 (1949), p. 35.

[12] E.g. Exchange of Notes of 4 July 1932 between Denmark and Czechoslovakia: *L.N.T.S.* 14 (1933–4), p. 251; and Exchange of Notes of 10 December 1948 between the United Kingdom and Denmark: *U.N.T.S.* 45 (1949–50), p. 320.

[13] E.g. Exchange of Notes of 14 November 1929 between Hungary and Portugal: *L.N.T.S.* 105 (1930), p. 287.

[14] E.g. Exchange of Notes of 6 January and 7 June 1949 between India and Ethiopia: *U.N.T.S.* 35 (1949), p. 13.

[15] E.g. Exchange of Notes of 22 March, 23 April, and 3 May 1946 between New Zealand and Norway: ibid. 16 (1948), p. 211.

[16] E.g. Exchange of Notes of 24 June 1927 between Finland and Switzerland: *L.N.T.S.* 68 (1927), p. 103; and Exchange of Notes of 8 and 19 December 1942 between the United States and Canada: *U.N.T.S.* 26 (1949), p. 363.

[17] E.g. Exchange of Notes of 3 June 1926 between Austria and the Netherlands: *L.N.T.S.* 59

by Proclamation,[1] or Proclamation by one party and approval by the other.[2]

It has occasionally been stated that exchanges of notes are used only for the conclusion of agreements on topics of 'minor importance'.[3] This is not borne out by the evidence of practice. In the years before the Second World War, a number of important agreements of a political nature were concluded by the United Kingdom Government by exchange of notes. Among these were the renunciation of extraterritorial judicial rights in Albania,[4] the limitation of naval armaments with Germany,[5] the termination of perpetual leases in Japan,[6] and the agreement arising out of the establishment of diplomatic relations with the Soviet Union.[7] During the Second World War, among agreements of importance concluded in this way may be mentioned the establishment of regulations for the utilization of Polish troops in the war against Germany,[8] and the transfer of fifty destroyers by the United States to the United Kingdom in exchange for the provision of air and naval facilities in British transatlantic territories.[9]

Since the end of the Second World War, apart from general comprehensive agreements such as those between the United States and the Yemen,[10] and the United States and Nepal,[11] on diplomatic and consular representation, juridical protection, commerce and navigation, there have been numerous agreements of political importance concluded by exchanges of notes. These have included such matters as transfer of military aid;[12] transfer and lease of military bases;[13] maintenance of armed forces[14] and

(1926–7), p. 243; and Exchange of Notes of 24 January 1947 between Belgium and Spain: *U.N.T.S.* 19 (1948), p. 3.

[1] E.g. Exchange of Notes of 30 November 1950 between Denmark and the Union of South Africa: ibid. 84 (1951), p. 51.

[2] E.g. Exchange of Notes of 4 August 1937 between the United States and the Soviet Union: *L.N.T.S.* 182 (1937–8), p. 113.

[3] Satow, *A Guide to Diplomatic Practice* (3rd ed. revised by Ritchie, 1932), p. 379.

[4] Of 6 February 1926: *Treaty Series*, No. 3 (1926), Cmd. 2616.

[5] Of 18 June 1935: ibid., No. 22 (1935), Cmd. 4953.

[6] Of 25 March 1937: ibid., No. 29 (1937), Cmd. 5548.

[7] Of 20 and 21 December 1929: ibid., No. 2 (1930), Cmd. 3467.

[8] Of 12 October to 25 November 1939: ibid. No. 5 (1940), Cmd. 6172.

[9] Of 2 September 1940: *L.N.T.S.* 203 (1940–1), p. 201.

[10] Of 4 May 1946: *U.N.T.S.* 4 (1947), p. 165.

[11] Of 25 April 1947: ibid. 16 (1948), p. 97.

[12] E.g. furnishing of military equipment and supplies by the United States to Greece, of 25 July and 9 October 1947: ibid. 34 (1949), p. 130; transfer of naval vessels by the United Kingdom to China, of 3 February 1949: *Treaty Series*, No. 39 (1949), Cmd. 7457.

[13] E.g. return of Reykjavik airfield by the United Kingdom to Iceland, of 12 October 1944: ibid., No. 39 (1946), Cmd. 6993; transfer of military bases and installations by the United States to the Philippine Republic, of 14 and 16 May 1949: *U.N.T.S.* 67 (1950), p. 199; lease of a fleet anchorage by the United Kingdom to the United States, of 6 February and 6 March 1951: *Treaty Series*, No. 36 (1951), Cmd. 8238; lease of an area as a practice bombing range by the Federal Republic of Germany to the United Kingdom, of 9 September 1952: ibid., No. 59 (1952), Cmd. 8684.

[14] E.g. maintenance of an R.A.F. Communications Flight in Greece by the United Kingdom, of

military missions[1] on foreign soil; mutual defence assistance;[2] transfer of authority from military to civil powers[3]; settlement of war claims;[4] transfer of responsibility for the administration of territory;[5] settlement of boundary disputes;[6] delimitation of territorial waters;[7] renunciation of consular rights;[8] jurisdiction over foreign armed forces for criminal offences;[9] facilitation of freedom of movement of persons;[10] facilitation of the settlement of disputes at sea[11] and settlement of cases pending before mixed courts.[12] None of these matters can be considered of 'minor importance'.

In other spheres, especially commerce and finance,[13] health, communications, taxes, shipping, and the fast-expanding field of civil aviation, the use of exchanges of notes as a means of concluding agreements has been widespread and is increasing. Although some of these agreements are undoubtedly of a 'technical character', the fact that the matter dealt with is not of a political character does not necessarily mean that it is less important. In addition, the instrument of an exchange of notes has been used for the purpose of effecting accession to treaties,[14] renewal,[15] exten-

5 June 1947: ibid., No. 61 (1947), Cmd. 7193; stationing of United States forces in China, of 29 August and 3 September 1947: *U.N.T.S.* 9 (1947), p. 91; and in Guatemala, of 29 August 1947: ibid. 27 (1949), p. 11.

[1] E.g. maintenance of a United States Naval Mission in Colombia, of 22 September and 5 November 1942: ibid. 24 (1949), p. 227; and a United States Military Aviation Mission in Chile, of 27 November and 23 December 1942 and 14 April 1943: ibid. 9 (1947), p. 331.

[2] E.g. between the United States and Iran, of 23 May 1950: ibid. 81 (1951), p. 3.

[3] E.g. transfer of civil administration and jurisdiction in Belgian territory liberated by Allied troops to Belgium, of 16 May 1944: *Treaty Series*, No. 19 (1946), Cmd. 6875; transfer of responsibility from the American Military Government in Italy to the Italian Government, of 3 September 1947: *U.N.T.S.* 67 (1950), p. 15.

[4] E.g. between the United Kingdom and Thailand of 4 May 1950 to 3 January 1951: *Treaty Series*, No. 16 (1951), Cmd. 8163.

[5] E.g. transfer by the United Kingdom of the administration of the Dodecanese Islands to Greece, of 31 March to 7 April 1947: ibid., No. 39 (1947), Cmd. 7142; of the administration of the Turtle and Mangsee Islands to the Philippine Republic, of 19 September 1946 to 20 April 1948: ibid., No. 58 (1951), Cmd. 8320; and of the provisional administration of Somalia to Italy, of 20 and 21 March 1950: ibid., No. 14 (1952), Cmd. 8502.

[6] E.g. between the United Kingdom and Brazil, of 15 March 1940; *U.N.T.S.* 5 (1947), p. 71; and the United Kingdom and China, of 18 June 1941: ibid. 10 (1947), p. 227.

[7] E.g. in the area adjacent to the bases in Newfoundland leased by the United Kingdom to the United States, of 13 August to 23 November 1947: *Treaty Series*, No. 1 (1948), Cmd. 7294.

[8] E.g. in China by Switzerland, of 13 March 1946: *U.N.T.S.* 14 (1948), p. 159; and by Portugal, of 1 April 1947: ibid., p. 177.

[9] E.g. regarding United States forces in China, of 21 May 1943: ibid., p. 353.

[10] E.g. between Belgium and France, of 7 and 14 March 1950: ibid. 65 (1950), p. 141.

[11] E.g. between Denmark and Belgium, of 30 December 1948: ibid. 25 (1949), p. 173.

[12] E.g. between the United Kingdom and Syria, of 1 and 2 November 1946: ibid. 11 (1947), p. 153; and the United Kingdom and Lebanon, of 22 January 1947: *Treaty Series*, No. 45 (1947), Cmd. 7154.

[13] E.g. out of 325 commercial agreements concluded by the United Kingdom between April 1654 and December 1936, 90, or over 25 per cent., were in the form of exchanges of notes: *List of Commercial Treaties Etc. with Foreign Powers* (1937), published by the Foreign Office, pp. 2–52.

[14] E.g. Exchange of Notes of 19 December 1923 and 2 January 1924 between Great Britain and Czechoslovakia: *Treaty Series*, No. 14 (1924), Cmd. 2074.

[15] E.g. Exchange of Notes of 4 January and 20 February 1922 between the Netherlands and Roumania: *L.N.T.S.* 12 (1922), p. 219.

sion[1] or prolongation,[2] amendment[3] or modification,[4] interpretation,[5] and termination of treaties.[6]

While the method of exchange of notes is not a new device in international law,[7] its use has vastly increased in the last twenty-five years. In the years 1921–30, out of 338 instruments published in the *Treaty Series*, 93, or about 28 per cent., were exchanges of notes.[8] In the years 1941–50, out of 453 instruments published therein, 195, or about 44 per cent., were exchanges of notes. The figures for 1951—49 exchanges of notes out of 104 instruments—and 1952—41 exchanges of notes out of 70 instruments—show that exchanges of notes account for over 50 per cent. of the instruments published. Out of the first 1,000 instruments[9] registered with the Secretariat of the League of Nations, 212, or 21 per cent., were exchanges of notes. Although the figure dropped somewhat for the second 1,000 instruments[10] registered—there were only 171 exchanges of notes—it rose sharply for the third 1,000 instruments[11] to 244 exchanges of notes, and for the fourth 1,000 instruments[12] to 246. Out of the final 834 instruments[13] registered, 205 were exchanges of notes. Thus out of a total of 4,831 instruments published in the *League of Nations Treaty Series*, from 1920 to 1946, 1,078, or nearly 25 per cent., were exchanges of notes. The proportion of exchanges of notes to other instruments is even higher in the *United Nations Treaty Series*. Out of the first 1,000 instruments[14] registered[15]

[1] E.g. Exchange of Notes of 26 March, 23 and 30 May 1924 between Denmark and Switzerland: ibid. 25 (1924), p. 415.

[2] E.g. Exchange of Notes of 12 July 1925 between Great Britain and the Netherlands: *Treaty Series*, No. 36 (1925), Cmd. 2504.

[3] E.g. Exchange of Notes of 17 and 21 February 1927 between Great Britain and France: ibid., No. 8 (1927), Cmd. 2829.

[4] E.g. Exchange of Notes of 31 May 1928 between Great Britain and Spain: ibid., No. 28 (1928), Cmd. 3247.

[5] E.g. Exchange of Notes of 6 February 1928 between Great Britain and Spain: ibid., No. 10 (1928), Cmd. 3074.

[6] E.g. Exchange of Notes of 18 and 21 April 1921 between Roumania and Sweden: *L.N.T.S.* 4 (1921), p. 265.

[7] The so-called Rush-Bagot Agreement, an Exchange of Notes of 28 and 29 April 1817 between the United States, represented by the Secretary of State, and Great Britain, represented by the British Ambassador in Washington, limiting the naval forces of the two countries in the Lakes of North America, shows the pattern of form of exchanges of notes that has changed very little in the last 150 years: *Treaties and Other International Acts of the United States* (ed. by Miller, 1931), vol. 2, p. 645.

[8] The figures given here for the *Treaty Series* do not include the numerous exchanges of notes which are published as parts of, or are attached to, other instruments.

[9] *L.N.T.S.*, vols. 1–39 inclusive.

[10] Ibid., vols. 40–88 inclusive.

[11] Ibid., vols. 89–130 inclusive.

[12] Ibid., vols. 131–72 inclusive.

[13] Ibid., vols. 173–205 inclusive.

[14] *U.N.T.S.*, Part I, vols. 1–77, 1946–51.

[15] Exchanges of notes are registered in accordance with the Regulations adopted by the General Assembly on 14 December 1946 to give effect to Article 102 of the Charter. Article 1 of the Regulations lays down that every treaty or international *agreement, whatever its form and descriptive name*, shall be registered: ibid. 1 (1946–7), p. xx (Article 18 of the Covenant of the League of Nations—the predecessor of Article 102 of the Charter—provided that every treaty or international *engagement* should be registered).

with the Secretariat of the United Nations, 272, or 27 per cent., were exchanges of notes. Out of the first 249 instruments[1] filed and recorded with the Secretariat, 82, or 33 per cent., were exchanges of notes.[2] This vast increase in the use of exchanges of notes is due to a number of related factors.

At a time when contracts between states were of a formal nature and concluded between Heads of States through or after solemn conferences, and when no developed system of communication existed, exchanges of notes could serve no purpose. For historically the usefulness of exchanges of notes as a means of concluding agreements was limited by the very qualities which give it its value as an instrument today, namely, informality and speed. Two historical developments prepared the ground for the emergence of the exchange of notes. There was, in the first place, the acceptance in the second half of the seventeenth century of permanent legations as a general institution[3] for the purpose of facilitating the conduct of international relations. Secondly, the rapid advances in postal and telegraphic services in the nineteenth century began to undermine the solid foundation of conference and personal negotiation. These developments assisted the growth of international intercourse in its various manifestations, and enabled the exchange of notes to play an increasingly important rôle in international law.

The paramount factor in the modern development of the exchange of notes as an instrument of importance is, apart from the general increase in international intercourse, the recently adopted practice of concluding inter-governmental agreements[4] in addition to, and now almost as a substitute for, the more traditional agreements negotiated and signed on behalf of Heads of States, usually termed 'treaties' or 'conventions'.[5] International agreements entered into by governments can be more easily concluded without the formalities of an international conference and the complex machinery of formal 'treaties'.[6] The pressing needs have been for speed and simplicity, without sacrifice of juridical effect. Exchanges of notes meet those needs. This development has been facilitated by a diminishing formalization in the conclusion of international agreements. The decreasing use of ratification[7] is illustrative of this tendency.

[1] *U.N.T.S.*, Part II, vols. 1–79, 1946–51.

[2] These figures cover the first four years of the Organization. They do not include many exchanges of notes forming part of, or attached to, other instruments published in the *United Nations Treaty Series*.

[3] Oppenheim, op. cit., p. 688.

[4] Ibid., p. 811.

[5] Satow, op. cit., p. 318.

[6] 'An exchange of diplomatic notes has often sufficed, without any further formality of ratification or exchange of ratification, or even of proclamation, to effect a purpose more usually accomplished by the more complex machinery of treaties': Report of the Secretary of State, Mr. Foster, to the President of the United States, 1892, quoted in Moore, *A Digest of International Law*, vol. v (1906), p. 215.

[7] See below, pp. 224–5.

A contributing factor in the process of development is the increase in the number of inter-departmental agreements and administrative arrangements arising principally from the complexities of modern government and the growth of ministerial and departmental powers. Although these agreements are concluded directly between ministers and departments, without passing through diplomatic channels, they are, as are inter-governmental agreements, binding on the state. Here, too, exchanges of notes have been found to fulfil a useful function.[1]

II. *Exchanges of notes and decisions of courts*

While there exists apparently only one decision of an international tribunal on the subject,[2] municipal courts have on numerous occasions considered the effect of exchanges of notes.

[1] Reference may be made in this connexion to some other forms of instruments closely resembling exchanges of notes in form, namely, exchange of telegrams, exchange of messages, and exchange of *aides-mémoire* or memoranda. The conclusion of agreements by exchange of messages—concluded directly between heads of governments (see, e.g., Exchange of Messages of 1 July 1941 between the United States and Iceland: *U.N.T.S.* 12 (1948), p. 405)—and exchange of telegrams (see, e.g., Exchange of Telegrams of 9 December 1948 and 25–28 January 1949 between Ethiopia and Pakistan: ibid. 35 (1949), p. 10) carries the characteristics of exchange of notes—speed and informality—a step forward. In *Banque de l'Union Parisienne* v. *Jaudon* (*Annual Digest*, 1933–4, Case No. 32) the Court of Appeal of Paris had no hesitation in holding an Exchange of Telegrams binding as an international agreement. In that case, following an Agreement concluded between France and the Soviet Union by an Exchange of Telegrams of 28 and 29 October 1924 by which, *inter alia*, France recognized the Government of the Soviet Union, the defendant was appointed administrator and sequestrator of certain abandoned Russian property and interests. The Order making the appointment was issued some days before the Agreement was concluded, but the Court held that it was impliedly foreseen and authorized by the Agreement. The Court delcared (ibid., p. 79) that the Exchange of Telegrams '. . . forms an international convention negotiated by the French Government in the fullness of its constitutional power, and respect for which, as equal to a law, is imposed on all'.

It is not uncommon in exchanges of notes for the substance of an agreement proposed to consist of a memorandum which is attached to a Note (e.g. Exchange of Notes of 30 April and 27 July 1923 between Chile and Norway: *L.N.T.S.* 33 (1925), p. 249). An elaboration of this method is provided in the use of *aides-mémoire* or memoranda as composing the Note itself. In the Exchange of Notes of 28 September and 11 October 1920 between Italy and the Netherlands (ibid. 28 (1923), p. 253), a Memorandum from the Government of the Netherlands traced the events leading to the need for the revival of a Convention between the two states and inquired of the attitude of Italy. The Italian Government assented to the proposed revival, its reply being in the form of a *note verbale*. The form of *aides-mémoire* or memoranda is similar to that of *notes verbales*. See also Exchange of *Aides-Mémoire* of 24 June 1947 between the United States and Sweden: *U.N.T.S.* 36 (1949), p. 25.

[2] The international decision in question was that of Judge Huber in the *Residence at Rio-Martin* case. (Judge Huber, of the Permanent Court of International Justice, was sitting as Rapporteur under an Arbitration Agreement of 1923 between the United Kingdom and Spain for the purpose of adjudicating upon various claims which arose out of incidents in the Spanish Zone of Morocco). In that case, a Treaty of 1783 between the United Kingdom and the Maghzen of Morocco had provided, *inter alia*, that the Maghzen should erect at Rio-Martin a house, part of which was to be used as a residence for the British Consul. In pursuance of this provision a house was erected at Rio-Martin and was used as a residence by the British Consul. In 1914 the house was demolished by Spanish troops. In 1896, however, the British Diplomatic Agent at Tangier had entered into discussions with the Maghzen with a view to exchanging the house at Rio-Martin for a new residence to be erected at or in the neighbourhood of Tetuan. In an Exchange

A survey of their decisions shows that, with minor exceptions, courts have acted on the view that exchanges of notes constitute obligations binding on the states concerned and that they partake of the nature of treaties. Many of the decisions involve the question of the incorporation of international agreements into municipal law. According to the Constitutions of Germany, France, the United States, and Italy, 'treaties'—as defined by constitutional practice and interpretation—are not incorporated into municipal law unless they are ratified and, except in the case of the United States, published. But the courts have recognized a class of agreements, some of which are concluded by exchanges of notes, which can be validly incorporated into municipal law without ratification or publication.

In the *Paris Agreement* case, decided by the German Reichsgericht in Civil Matters,[1] the plaintiff sought repayment of the purchase price of timber bought from the defendant, the State of Prussia. The forests from which the timber was produced were ceded to Poland by the Paris Agreement, concluded by an Exchange of Notes of 9 January 1920 between Germany and Poland to give effect to certain provisions of the Treaty of Versailles. The plaintiff contested, *inter alia*, the validity of this Agreement on the ground that it had never been published in the *Journal* of the Reich as required of treaties by the Constitution. The Court held that the Paris Agreement contained no provision for ratification and that no ratification was necessary. In the view of the Court, according to the German Constitution, the conclusion of treaties with foreign states lay within the competence of the President of the Reich. However, there was, in addition to this solemn form of treaties, an informal type of agreement which usually comes into being by the signature of a common document or the exchange of separate documents. The Paris Agreement was such an informal agreement, and was as valid as a treaty.

In *Société de Bienfaisance Grecque-Orthodoxe Syrienne d'Alexandrie* v. *G. J. Siag and Others*,[2] the Civil Tribunal of Alexandria, in determining the nationality of a deceased for the settlement of claims to property under a holographic will, considered the effect of an Exchange of Notes between the Soviet Union and Egypt. The plaintiff Association argued that the deceased had died a Russian national and that his Russian nationality had been frequently recognized by the Egyptian Government. Evidence was presented to show that the deceased had been registered as a Russian

of Letters between the parties it was agreed that the Moroccan Government should look for a convenient site or house at Tetuan. The British Government maintained that the authorities of the Protectorate were bound under this Agreement to find a site and erect there a suitable residence. Judge Huber held that the British claim must be upheld. The Exchange of Letters between the authorized representatives of the two Governments revealed clearly the agreement of the two parties. The obligation—passing from the Maghzen to the Protecting State—was a perfect one, at least inasmuch as it constituted a *pactum de contrahendo* (*Annual Digest*, 1923–4, Case No. 8).

[1] Ibid., 1919–22, Case No. 225.

[2] Ibid., 1931–2, Case No. 122.

national by the Russian Consulate and was claimed as a Russian national by the Russian Government. Futhermore, as a result of an Exchange of Notes the Egyptian Foreign Minister had instructed local authorities that the deceased's wife must be treated as a Russian national. The Court held that this Exchange of Notes was conclusively binding on it and that the Russian nationality of the deceased could therefore no longer be questioned since '. . . the judicial authority is incompetent to question the regularity of an act of sovereignty emanating from two governments in the plenitude of their powers'.[1]

In *Minister of Finance* v. *United States Lines Co.*,[2] the *Conseil d'État* held that American shipping companies having their places of business in France were exempt from the tax on businesses and must not be subjected to the municipal tax on business premises. The Court based its decision on an Agreement between France and the United States concluded by an Exchange of Notes. This Exchange of Notes was described by the Court as 'l'accord diplomatique',[3] and in the headnote to the report as 'convention'.[4]

In an Exchange of Notes of 16 November 1933 between the United States and the Soviet Union, the United States Government agreed, *inter alia*, with the Soviet Government that amounts due to the latter from American nationals were to be assigned to the United States. Two cases of considerable importance, both arising from that Exchange of Notes, came subsequently before the Supreme Court of the United States. The first, *United States* v. *Belmont*,[5] involved a decree of the Soviet Government dissolving a Russian corporation and expropriating all its assets, including a deposit account with a bank in New York. The Supreme Court pointed out that the assignment and the agreements in connexion therewith did not, as in the case of 'treaties' in the sense in which that term is used in Article 2, § 2, of the Constitution, require the advice and consent of the Senate. An international compact, such as that before the Court, was not always a treaty which required the participation of the Senate. It was therefore held that the Agreement was binding on the Court and that, therefore, the deposit account belonged to the United States. This decision was followed, even more emphatically, by the Supreme Court in *United States* v. *Pink*.[6] The Court held that compacts such as that constituted by the Exchange of Notes before it did, like treaties, override contrary state law—in the present case the public policy of the State of New York.

When, however, the exchange of notes under consideration is of an interpretative character, the decisions of municipal courts vary in method of approach. Faced with agreements of this type, some courts have attempted

[1] *Annual Digest*, 1931–2, Case No. 122.
[2] *Clunet*, 65 (1938), p. 532.
[3] Ibid., p. 533.
[4] Ibid., p. 532.
[5] (1937), 301 U.S. 324: *Annual Digest*, 1935–7, Case No. 15.
[6] (1942), 315 U.S. 203: ibid., 1941–2, Case No. 13.

to treat them as if they were, although primarily interpretative, really independent agreements.

Thus, for example, the Italian Court of Cassation, in *Russian Trade Delegation in Italy* v. *Querci*,[1] held that the Exchange of Notes of 7 February 1939 between Italy and the Soviet Union, although intended to interpret the meaning of an Article of the 1924 Treaty of Commerce and Navigation between the Parties, was in the nature of a new agreement and could not therefore be interpretative.[2] One of the objects of the Agreement was to release the Russian Trade Delegation in Italy from certain commercial liabilities. The Delegation contended that, being interpretative, it had retroactive effect to 1924. The Exchange of Notes was to enter into force on 1 May 1939. The Court held that the latter provision coupled with the fact that the Agreement was a new and independent instrument meant that it had no retroactive effect.[3]

Other courts have treated exchanges of notes of an interpretative character as if they were but part of the original agreement and therefore binding as part thereof. In *Huckendubler* v. *Hoeffleur*[4] difficulties had arisen as to the application to aliens of certain French rent legislation of 1926 and 1929. Following upon diplomatic protests against various court judgments, France concluded Agreements by Exchanges of Notes of 21 and 25 May 1929 with Great Britain and of 11 and 26 July 1929 with Switzerland whereby it was provided that Treaties of 1882 with those states were to be interpreted in the sense that their purpose was to secure for the nationals of the parties the advantages of rent legislation. The Court held that the Exchange of Notes interpreting thus the Treaty of 1882 between France and Switzerland was binding on it, for states which sign a diplomatic convention are competent to decide its meaning and scope. The Exchange of Notes in question was a contractual interpretation. The Court said: 'This bilateral interpretation, irrespective of its form, is part of the convention itself and should be observed and applied as though it expressed officially the common intention of the governments concerned.'[5] Similarly, the French Civil Tribunal of the Seine, in *Société Ruegger et Boutet* v. *Société Weber et Howard*,[6] considered the effect of the Exchange of Notes of 21 and 25 May 1929 between France and Great Britain interpreting an

[1] *Annual Digest*, 1941–2, Case No. 129.

[2] The Court cast doubt—although it thought that such evidence was unnecessary in the circumstances of its decision—upon the effect that the Exchange of Notes could have on the law which had rendered the 1924 Treaty executive in Italy as the Treaty had not been rendered executive itself. But a note to the report of the case points out that the Agreement has in fact been rendered executive in Italy by a Law of 15 May 1939: ibid., p. 409.

[3] The parties may, of course, expressly provide for an exchange of notes to have retroactive effect; see above, p. 210.

[4] A decision of the Commission Supérieure de Cassation: *Annual Digest*, 1931–2, Case No. 213.

[5] Ibid., p. 394. For other cases not mentioned below, see references in a note to the report of this case: ibid., p. 395.

[6] Ibid., 1933–4, Case No. 179.

article of the Anglo-French Treaty of 1882 which accorded to nationals of the two states most-favoured-nation treatment in commercial matters. A memorandum of this Exchange of Notes was sent by the French Foreign Minister to the Minister of Justice. The Court held[1] that the Exchange of Notes constituted a bilateral convention interpretative of the 1882 Treaty. It was a 'clause added to the treaty which is embodied therein, has the same authority, and, like it, has the binding force of law'.[2]

In *Mollet* v. *Lemoine*,[3] a Swiss subject, leaseholder of business premises, claimed renewal of his lease under the terms of the 1926 legislation relating to commercial leases. By the Exchange of Notes of 11 and 26 July 1929, brought into force by a Presidential decree, the two Governments agreed that Swiss subjects in France should enjoy the advantages of the 1926 law under the same conditions as French subjects. The Court of Paris held that Swiss subjects were not entitled to the benefit of the legislation since Swiss law did not give analogous treatment to French subjects and certain articles of the 1882 Treaty between France and Switzerland established absolute equality of treatment in respect of nationals of the two states for the exercise of commerce and industry. The Exchange of Notes could not alter this. On appeal, the Court of Cassation held that the Exchange of Notes completed the Franco-Swiss Treaty of 1882 and clearly overruled the law of 1926 as regards Swiss subjects, and they were therefore entitled to the benefits of that law.

The same rent legislation gave rise to a number of other cases, the decisions of which are not entirely consistent. In *Vicens* v. *Bonfillon*,[4] the Court of Appeal of Dijon held that an Exchange of Notes of 17 and 28 February 1933 between France and Spain interpreting the scope of the Franco-Spanish Consular Convention of 1862 was binding upon it as it was an interpretative agreement incorporated into the Convention so as to form with it one instrument. In the same vein it was held by a Chamber of the Tribunal of Commerce of the Seine in *Société New-Callao Gold Mining Co.* v. *Liebkin and Comptoir franco-tchécoslovaque*[5] that the Exchange of Notes of 21 and 25 May 1929 between France and Great Britain interpreting the 1882 Treaty, which granted most-favoured-nation treatment to British subjects in France, so as to extend this provision to cover private rights in general, was binding on it.[6] However, another Chamber of the same Court, on similar facts, held, in *Lloyd's Bank Ltd.* v. *de Gaillard* and *The Same* v. *de Ricqles*,[7] that the Exchange of Notes could not extend

[1] The decision was affirmed by the Court of Appeal of Paris in 1936: *Annual Digest*, 1919–42 (Supplementary Volume), Case No. 127.

[2] Ibid., 1933–4, p. 405.

[3] Ibid., 1935–7, Case No. 152.

[4] Ibid., 1933–4, Case No. 180.

[5] *Revue de droit international privé*, 25 (1930), p. 447.

[6] The decision is supported by that of the Court of Appeal of Colmar in *Midwood and Co.* v. *Geismar*: *Revue critique de droit international*, 1937, p. 85.

[7] *Revue de droit international privé*, 26 (1931), p. 105.

in this manner the provisions of a particular treaty, especially to overrule the requirement of depositing security for costs (*cautio judicatum solvi*), required by Articles 166 and 167 of the Code of Civil Procedure. It further held that the interpretation contained in the Notes was clearly based on a condition of reciprocity. Article 11 of the Civil Code lays down that foreigners shall enjoy the same civil rights in France as those accorded to French nationals by treaties with the state of which the foreigner is a national. As it was clear that French nationals in England who were plaintiffs before English courts enjoyed no such dispensation of guarantee for the costs, no such right was enjoyed by English nationals in France. This decision, although supported by that of the Court of Appeal of Amiens in *Société Poulin* v. *Utilities Improvements Co.*,[1] the judgment in which was affirmed in 1941 by the Court of Cassation,[2] lost some of its force in the face of the application by another Court[3] of the principle subsequently laid down as regards the question of this guarantee.[4] In *Couderc* v. *Grégori* the Court of Cassation laid down the principle that Article 11—which embodied the condition of reciprocity—could not prevail over an interpretation of a treaty by the French Foreign Ministry.

In *Rondoé* v. *Lardan*,[5] the Court of Cassation held an Exchange of Notes of 11 and 24 April 1934 between France and Belgium interpreting a Franco-Belgian Treaty of 1927, brought into force by a Presidential decree, binding as part of the Treaty. However, it was not applicable in the case at hand as it specifically provided for no retroactive effect in respect of decisions which had obtained the force of *res judicata*. The judgment under review had been delivered before the date of the entry into force of the Exchange of Notes and had therefore the force of *res judicata*. In *Verbrigghe* v. *Bellest*[6] the appellant, a Belgian subject lessee of a farm in France, sought renewal of the lease under the terms of certain legislation. This was an Ordinance of 1945 which could only be invoked by an alien whose children had acquired French nationality, and a Law of 1943 on the application to aliens of the laws on leases which assimilated aliens who were protected by a diplomatic Convention to French subjects, all restrictive provisions contained in legislation relating to leases notwithstanding. The appellant relied on the Franco-Belgian Treaty of 1927, as interpreted by the Exchange of Notes referred to in *Rondoé* v. *Lardan*, as giving him protection within the meaning of the Law. The Court of Cassation, reversing a decision of the Commission Paritaire d'Arrondisse-

[1] *Annual Digest*, 1935–7, Case No. 220.

[2] In *Utilities Improvements Co. Ltd. et al.* v. *Société Poulin et Fils*: ibid., 1919–42 (Supplementary Volume), Case No. 130.

[3] Tribunal of Commerce of Havre in *Wilfrid Harrisson* v. *Établissements Francks & Sons and Worms & Co.*: *Revue de droit international privé*, 26 (1931), p. 511.

[4] Ibid., p. 505.

[5] *Annual Digest*, 1938–40, Case No. 180.

[6] Ibid., 1947, Case No. 76.

ment of Louviers, held that the Ordinance and Law did not affect aliens who could invoke an international convention exempting them from the conditions. The Treaty, as interpreted by the Exchange of Notes, formed together such an international convention and the appellant was therefore permitted to seek a renewal of his lease.[1] A similar decision[2] was given by the Tribunal Paritaire d'Arrondissement of Valenciennes in *Duronsoy* v. *Lengrand*.[3]

In a number of cases which have arisen in France since the end of the Second World War, especially concerning extradition, decisions have been much more at variance with previous authority and each other. In *Re Talbot*,[4] the Court of Appeal of Paris considered a request by Belgium for the extradition of Talbot, a Belgian national charged with economic collaboration with the enemy. It was held that the request must be refused since the crime was not one covered by the provisions of the Franco-Belgian Extradition Treaty of 1874. The Court refused to take cognizance of an Exchange of Notes of 17 December 1946 and 10 January 1947 between France and Belgium extending the provisions of the Treaty to other crimes, including that of which Talbot was accused. It pointed out that this agreement was not mentioned by the requesting government, and that in any event no such agreement, the text of which had not been communicated to the Court, could have the force of law within France, having regard to Article 26 of the Constitution,[5] without ratification and publication.

This decision is supported by that in *Re Vermote*,[6] a decision of the Court of Appeal of Riom on similar facts, in which the lack of ratification of the Exchange of Notes was held to leave it without legal effect in France.[7] It is further supported by a later decision in *Benzoni* v. *Davidovici*,[8] although in that case no question of extradition was involved. An Exchange of Notes of 17 June 1946 between France and Italy extended most-favoured-nation treatment, and was brought into force by a Presidential decree but was not presented to Parliament for its approval. The Court, a Tribunal of Bonneville, held that in the absence of Parliamentary approval the Exchange of Notes had no validity.[9] However, there are decisions in the opposite sense. Thus is the leading case of *Zumkeller* v. *Florence and*

[1] This judgment lessened the force of the decision in *David* v. *van Meule*, where, on similar facts, the Commission Paritaire d'Arrondissement of Louviers reached the opposite conclusion: *Annual Digest*, 1946, Case No. 84.

[2] For further cases see references cited in a note to the report of *Verbrigghe* v. *Bellest*: ibid., 1947, pp. 161–2.

[3] Ibid., Case No. 77.

[4] Ibid., Case No. 68.

[5] See below, p. 222.

[6] *Sirey*, vol. ii (1950), p. 154.

[7] There are decisions to the contrary, other than those mentioned below, cited in a note to the report: ibid., p. 155.

[8] Ibid., vol. ii (1951), p. 79.

[9] The decision is severely criticized in a note to the report, according to which the view of the Court is contrary to doctrine, jurisprudence, and the views of Foreign Offices: ibid.

Peillon.[1] The Exchange of Notes of 11 and 26 July 1929—already mentioned in cases discussed above—between France and Switzerland extending most-favoured-nation treatment granted by the 1882 Treaty was brought into force by a Presidential decree but not submitted to Parliament for its approval. The Court of Cassation held the agreement to be valid and binding.[2] This judgment has been supported by the decision of the Civil Tribunal of the Seine[3] in *Gautier* v. *Weld and Co.*,[4] that of the Conseil d'État in *Minister of Finance* v. *United States Lines Co.*,[5] and that of the Court of Appeal of Paris (in 1940) in *Cie Internationale des Wagons-Lits* v. *Société des Hôtels Réunis*.[6]

In *Re Colman*,[7] Belgium requested the extradition of Colman, a Belgian national sentenced to death for intelligence with the enemy and carrying arms against Belgium. Neither of these offences was covered by the Franco-Belgian Extradition Treaty of 1874. However, by Exchange of Notes of 17 December 1946 and 10 January 1947 between France and Belgium, it was agreed to surrender individuals prosecuted or condemned for crimes or delicts against the internal safety of the state committed during the war against a common enemy. This Agreement, as in *Re Talbot*,[8] extended the provisions of the Extradition Treaty to cover the specified offences. This time the same Court held that while Article 26 of the Constitution confined itself to confirming the superiority of treaties, regularly ratified and published, over French municipal law, the Government was not prohibited by the Constitution from entering into any particular agreement in matters in which it alone was competent to act. The Exchange of Notes was an Agreement validly extending the scope of the Extradition Treaty. *Re Kauffman*,[9] *Re Bulterys*,[10] *Re Trivier*,[11] and *Re Brahy*,[12] in which French courts recognized as valid and binding Exchanges of Notes between France and Luxembourg and France and Belgium extending the provisions of existing Extradition Treaties, support *Re Colman*.

From these cases it can be seen that in general municipal courts have taken the view that an exchange of notes constitutes an international obligation binding the states concerned,[13] and that the conclusion of agree-

[1] *Sirey*, vol. i (1936), p. 257; *Annual Digest*, 1935–7, Case No. 202.

[2] See the long discussion by Raynaud of the background to the decision and the general problems involved: *Sirey*, vol. i (1936), pp. 257–9.

[3] For a similar decision by the same Court see *X.* v. *Y.*, cited in *Annual Digest*, 1919–42 (Supplementary Volume), p. 236.

[4] *Gazette du Palais*, 9 July 1936.

[5] See above, p. 217.

[6] *Annual Digest*, 1919–42 (Supplementary Volume), Case No. 131; see also *Veuve M.* v. *Société X.*, a decision of the Civil Tribunal of Lille, cited ibid., p. 236.

[7] Ibid., 1947, Case No. 67.

[8] See above, p. 221.

[9] *Dalloz hebd.*, 1945, p. 122.

[10] Cited in *Annual Digest*, 1947, p. 141.

[11] *Dalloz hebd.*, 1947, p. 468.

[12] Ibid.

[13] This was also the view of the Arbitral Tribunal in the only case to come before an international court; see above, p. 215, n. 2.

ments in this manner is properly within the competence of the executive branch of government. This being so, exchanges of notes override contrary municipal law without being subject to constitutional requirements for the incorporation of 'treaties'. A minority of courts has regarded exchanges of notes as being not merely analogous to 'treaties', but as being themselves 'treaties' as that term is used in constitutional practice. They are therefore not binding on the courts unless incorporated into municipal law in the same manner as 'treaties', usually by parliamentary approval and publication. Whichever view is taken, all the courts in the cases discussed have treated exchanges of notes as being within the category of treaties.

III. *Exchanges of notes and codification of international law*

In view of governmental and judicial practice as examined in the present article it may be difficult to follow the attempts to treat exchanges of notes as if they were, or should be, governed by legal rules different from those which apply to other instruments used to effect the same purpose, namely, the conclusion of binding international agreements. The Harvard Research Draft Code on the Law of Treaties,[1] the most complete attempt at codification until 1950, deliberately excluded exchanges of notes from the scope of 'treaties'. Article 1 (*a*) defined the use of the term 'treaty' in the Code as

'. . . a formal instrument of agreement by which two or more states establish or seek to establish a relation under international law between themselves'.[2]

Article 1 (*b*) provided that the term 'treaty', thus defined, did not include an agreement effected by exchange of notes.[3] In the comment on this Article, the reason given for the exclusion was that while an exchange of notes may deal with any matter which is a proper subject of international regulation and while its purpose may be the same, its form was strikingly different from that of a 'treaty'. It was suggested that in view of the peculiar form of an exchange of notes, it was difficult to formulate a body of rules that would apply to it in the same way as to other instruments having a different form. However, the comment recognized that agreements effected by exchange of notes have the juridical force and effect of 'treaties', as that term is generally understood, and that the exclusion is therefore based on a difference of form and not on substance or legal effect. This differentiation is perhaps justified when a treaty is defined as an 'instrument' and not as an 'agreement'. However, it is submitted that such a view is unhelpful. The vital need in the law of treaties is to make it possible for all international agreements to be governed by the same

[1] *American Journal of International Law*, 29 (1935), Supplement.
[2] Ibid., p. 657.
[3] Ibid., p. 698.

rules as to validity, interpretation, and termination. A definition of a treaty as an instrument or document the drawing up or execution of which effects an agreement, shifts the emphasis from the essence of contractual law, municipal or international, namely, the consensus of wills, to a mere point of form. This 'formal' approach draws much of its strength from the division often made in municipal law between 'treaties' and other international agreements.[1] That distinction is based on constitutional provisions and practice and the requirement, in the case of 'treaties', of Parliamentary ratification or approval.

During the discussions of the subject of treaties by the International Law Commission in 1950 and 1951 some members favoured strongly the course proposed in the Harvard Draft for the reason that, as exchanges of notes did not require ratification, their assimilation to treaties ought to be discouraged. Thus Professor Scelle suggested that if notes were exchanged and then ratified, there would be a treaty, but not otherwise.[2] He pointed out that far too many important agreements were being effected which did not require ratification, and that to include agreements effected by exchange of notes within the term 'treaties' would be 'contrary to established usage, the development of international law and the interest of nations'.[3] This view was supported by other members of the Commision. However, a distinction between exchanges of notes and other international agreements based on the assumption that the one class does not require ratification whereas the other does is no more tenable than the distinction based on the contents of the two kinds of instruments.[4] Whereas exchanges of notes may require ratification,[5] there has been a marked decline in provision for ratification in international agreements, a tendency already mentioned.[6] Thus out of the first 1,000 instruments[7] registered with the Secretariat of the League of Nations, apart from 212 instruments in the form of exchanges of notes,[8] 280, or about 37 per cent., did not contain any provision for ratification.[9] Out of the first 1,000 instruments[10] registered with the Secretariat of the United Nations, approximately 77 per cent. contained no provision for ratification. Out of 578 instruments published in the *Treaty Series* in the years 1946–52 inclusive, 496, or over 85 per cent., contained

[1] See the cases above, pp. 215 ff. [2] U.N. Doc. A/CN. 4/SR. 51, 21 June 1950, p. 5.
[3] Ibid., A/CN. 4/SR. 50, 20 June 1950, p. 19. [4] See above, pp. 211 ff.
[5] E.g. Exchange of Notes of 7 September 1923 between Denmark and Estonia: *L.N.T.S.* 23 (1923), p. 73; Exchange of Notes of 10 February 1925 between the United States and Poland: ibid. 37 (1925), p. 141; Exchange of Notes of 13 October 1932 between South Africa and Germany: *Treaty Series*, No. 25 (1935), Cmd. 4961. In some cases exchanges of notes have been ratified although there was no provision for this in the agreement: e.g. Exchange of Notes of 4 July 1948 between the United States and Turkey: *U.N.T.S.* 34 (1950), p. 185.
[6] See above, p. 214. [7] *L.N.T.S.*, vols. 1–39 inclusive, 1920–6.
[8] Most of which contained no provision for ratification.
[9] Wilcox, *Ratification of International Conventions* (1935), pp. 232–3.
[10] *U.N.T.S.*, vols. 1–77, 1946–51.

no provision for ratification. Apart from exchanges of notes, almost all of which have become binding on signature alone, these have included some very important agreements, such as the establishment of the United Nations Relief and Rehabilitation Administration of 9 November 1943;[1] the establishment of the European Coal Organization of 4 January 1946;[2] the Agreement concerning Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945;[3] the termination of a state of war of 1 January 1946;[4] the constitution of control machinery in Austria and zones of occupation and administration in Vienna of 4 and 9 July 1945 and 28 June 1946;[5] the establishment of an International Authority for the Ruhr of 28 April 1949;[6] and the acceptance of the Constitutions of the Food and Agricultural Organization of 16 October 1945[7] and the International Refugee Organization of 15 December 1946 and 5 February 1947.[8] In contrast to this, Agreements on such matters as the permanent control of outbreak areas of red locusts of 22 February 1949,[9] and air transport services of 26 May 1950,[10] have been concluded subject to ratification. There is thus no magic in ratification.

However, even if the position were in fact that international agreements require ratification before they can be valid and binding, this must logically apply to *all* international agreements whatever their form, since it would not seem that any distinction is possible as to their legal nature or effect once they are finally concluded.[11]

It is generally agreed that international law prescribes neither the form nor the procedure for the conclusion of international agreements, and that the legal validity and efficacy of an international agreement does not depend upon the form of the instrument used for its conclusion.[12] In its Advisory Opinion in the *Customs Régime between Germany and Austria* case,[13] the Permanent Court of International Justice considered whether the proposed customs union between the two states would be incompatible with Article 88 of the Treaty of Saint-Germain of 1919 and the Geneva Protocol No. 1 of 1922, by which Austria undertook not to enter into any engagement calculated directly or indirectly to compromise her independence. In holding[14] that by the Geneva Protocol, in the form of a Declara-

[1] *Treaty Series*, No. 3 (1943), Cmd. 6491.
[2] Ibid., No. 1 (1946), Cmd. 6732.
[3] Ibid., No. 27 (1946), Cmd. 6903.
[4] Between the United Kingdom and India, and Siam: ibid., No. 10 (1951), Cmd. 8140.
[5] Ibid., No. 49 (1946), Cmd. 6958.
[6] Ibid., No. 28 (1949), Cmd. 7685.
[7] Ibid., No. 47 (1946), Cmd. 6955.
[8] Ibid., No. 25 (1950), Cmd. 7934.
[9] Ibid., No. 53 (1949), Cmd. 7783.
[10] With Iceland: ibid., No. 5 (1951), Cmd. 8135.
[11] Fitzmaurice in this *Year Book*, 15 (1934), p. 128.
[12] McNair, *The Law of Treaties* (1938), pp. 3 and 42; Westlake, *International Law* (2nd ed., 1912), vol. i, p. 290; Oppenheim, op. cit., p. 808.
[13] (1931), Series A/B, No. 41.
[14] The Opinion was rendered by a majority of 8–7, but the minority unanimously agreed with the majority as to the significance of the Geneva Protocol as constituting a binding international obligation upon Austria; ibid., pp. 74–75.

tion, Austria assumed certain undertakings in the economic sphere, the Court pointed out that:

'From the standpoint of the obligatory character of international agreements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchanges of notes.'[1]

It does not seem that this list was intended to be exhaustive, but merely illustrative.[2] There would not seem to be any distinction of legal relevance between formal and informal instruments. The name chosen for an instrument,[3] by reason of diplomatic considerations, usage, or mere accident, is of no juridical significance.[4] This being so, it is not difficult to appreciate the confusion that would have been caused had a Convention on the Law of Treaties been advanced under the auspices of the United Nations which deliberately excluded exchanges of notes from its orbit. In the end the International Law Commission decided, though only by a vote of 6–5, that the Draft Convention under preparation should deal with exchanges of notes.[5] This is a reason for satisfaction. Under the League of Nations, the Committee of Experts for the Progressive Codification of International Law considered the procedure of international conferences and for the conclusion and drafting of treaties.[6] The Committee adopted a list of forms in which treaties may be concluded and drafted.[7] These comprised exchanges of notes. It is the consensus of the parties which is the essence of the agreement and not the instrument, no matter what form it takes. All international compacts are contracts and therefore treaties in the wider sense of the term,[8] and it is submitted that they are no less treaties in the technical sense. The rules of international law governing the validity, effects, interpretation, and termination of treaties apply with equal force to exchanges of notes.

[1] *P.C.I.J.*, Series A/B, No. 41, p. 47.

[2] Hudson, *The Permanent Court of International Justice, 1920–1942* (1943), p. 632.

[3] An example of looseness in the use of terms is found in the Pact of Cordial Collaboration between Italy and Czechoslovakia, signed in 1924, which at different places in the text is called 'Pact', 'Convention', and 'Treaty': *L.N.T.S.* 26 (1924), p. 21.

[4] Oppenheim, op. cit., p. 809; Jessup, *A Modern Law of Nations* (1950), p. 123; Hudson, op. cit., p. 632.

[5] U.N. Doc. A/CN. 4/SR. 51, 21 June 1950, p. 11.

[6] *American Journal of International Law*, 20 (1926), Supplement, Special Numbers, July and October.

[7] Ibid., p. 204.

[8] Oppenheim, op. cit., p. 816.

JUDICIAL APPLICATION OF INTERNATIONAL LAW AND THE 'TEMPORIZING' CERTIFICATE OF THE EXECUTIVE[1]

By A. B. LYONS, M.A., LL.B.

SOME light on the juridical nature of the certificate of the Foreign Office or other department of the Executive to the court is thrown by a consideration of the general law of evidence and in particular of that branch of it which is concerned with the doctrine of judicial notice. 'Evidence' includes for the present purpose statements made by witnesses, or documents produced, to a court in relation to matters of fact under inquiry. Rules of court require all facts to be proved in certain specified ways—by oral statement on oath, by affidavit, &c.—save that certain facts may be proved otherwise than by evidence. These facts, which fall within a limited number of recognized categories, are sometimes loosely said 'to prove themselves'; more accurately, they are proved by what is called judicial notice. Among these facts are, for example, the natural and artificial divisions of time, the meaning of English words, and the existence and authority of a state, sovereign, or government recognized by Her Majesty.[2] The statement that such matters are the subject of judicial knowledge is seen, on analysis, to consist of two possible meanings. One is that the matter is in fact within the personal knowledge of the individual who is sitting as judge; the other is that the matter is one about which he is permitted to inform himself by direct inquiry and not only from the evidence of witnesses or proved documents. Thus, in order to establish a date, it will be proper for the judge to refer to a calendar or almanac, and for the meaning of an uncommon English word, or one with a special technical significance, he may refer to a standard dictionary. So, again, the judge will know, as a matter of public knowledge, that France is a republic; but who is the Head of the French state he will not be deemed to know—still less who is the ambassador accredited to and received by the Queen. For these facts again, the present[3] rule is that no evidence has to be given by the party alleging them, but the practice is that the judge[4] writes to the Foreign Office to inquire who is the head of a state or his ambassador, or whether a state has been recognized by Her Majesty.[5]

[1] I am indebted to Mr. G. G. Fitzmaurice, Legal Adviser to the Foreign Office, for guidance on the history of some of the more recent certificates dealt with in this article (comment and opinions about which are, however, my own).

[2] See Roscoe, *The Law of Evidence* (20th ed., 1934), p. 26.

[3] For the early practice see this *Year Book*, 23 (1946), pp. 241–8.

[4] Or sometimes, in practice, one of the parties.

[5] In the same way a judge may know that 'there is a war on'; and the date of the commence-

Although the above rule is now well established and frequently enunciated,[1] what is not so often realized is that the Government Department concerned may not be in a position to provide the information requested by the court or the parties, and that for one of several reasons. First, the times may be 'changing and difficult', and at such times to make a formal statement about the status of a ruler having perhaps imperfect sovereignty or about the recognition or non-recognition of an insurgent government may be embarrassing, or even premature. For Her Majesty's advisers may not yet have decided whether it is meet that a new state or government shall be recognized; indeed, the question may not previously have arisen.[2] The issuing of a categorically worded document which is to be read in open court may be tantamount to an act of recognition. Secondly, the Department may have no better knowledge of the facts which it is sought to establish than the parties have or can prove by the usual means of evidence.[3] In that case for the Department to supply the parties with the information requested is to enable them to obtain evidence cheaply which they ought to seek out and provide in the proper way, i.e. by finding eye-witnesses, bringing them to court and paying their proper expenses; it enables them to give evidence at second hand, which they would not normally be allowed to do. Thirdly, it is a prerequisite for the proper functioning of the rule that the inquiry be confined to questions of fact and that the Department be not asked to give opinions on what are strictly matters of law. It is not always easy to draw the line between what is a matter of fact and what is a matter of law; and the category of questions of mixed law and fact is not unknown in the international and diplomatic sphere. Fourthly, and this is perhaps a particular species of the genus thirdly above mentioned, the facts which the the Department of the Executive is asked to certify may be of such a novel or complex nature that the Executive feels under the necessity

ment of the war was the subject of a Royal Proclamation of which he must take judicial cognizance as of any other legislative act. But the date of the end of the war may have to be ascertained by inquiry of the Executive: cf. *R.* v. *Bottrill*, *infra*, p. 240. But see *Thelluson* v. *Cosling*, 4 Esp. 266, where a declaration made by the Court of Spain and transmitted from thence by the British Ambassador at Madrid to the Secretary of State was held to be sufficient evidence of the date in 1793 when war was declared by Spain against France. In the *Case of the Ionian Ships* Dr. Lushington said: 'I have not been told on behalf of the Crown—and Officers of the Crown ought to have received the information if there had been any such to be had—that Great Britain has done any act whatever to place the Ionian Islands in hostility with Russia. So far as my own knowledge goes, I know of none.' (8 State Trials, at p. 464.)

[1] See, for example, Dicey, *Conflict of Laws*, 6th ed. (1949), p. 131, Note 3; Stephens, *Digest of Law of Evidence*, 5th ed. (1899), p. 73, No. 1; Taylor, *Evidence*, 12th ed. (1931), p. 3. Cf. the remarks of Goddard L.C.J. quoted at pp. 234–5, *infra*.

[2] See, for an example, the Australian case of *Anglo-Czechoslovak & Prague Credit Bank* v. *Janssen*, (1943) V.L.R. 185; (1943) A.L.R. 427; *Annual Digest and Reports of Public International Law Cases*, 1946, Case No. 11, where the certificate of the Acting Minister of State for External Affairs of the Commonwealth commenced: 'As Australia has never entered into reciprocal diplomatic relations with the Czechoslovak Republic, its recognition of subsequent changes in Czechoslovakia is not capable of precise definition.'

[3] Cf. the case of *White, Child & Beney*, discussed below, pp. 236–9.

of referring the question back to the Court, which then has 'the power—and the duty—to interpret the certificate in accordance with the principles of International Law applicable to the situation'.[1]

These questions, doubts, and difficulties arise, for example, when a revolutionary government seizes control of a country or part of a country, or when independence is granted to a former colony or dominion, or in cases in which the head of a state has by treaty surrendered some part of his sovereign independence. In all these instances it has been the practice of the Executive to resort, in its replies, to the use of language which is less than categorical; and there is indeed observable a long and important line of cases in which the certificate given by the Executive is notably inconclusive. To this kind of certificate the epithet 'temporizing' is sometimes applied. It is that aspect of the certificate which will here be considered. While the present article is limited to cases which have come before English courts, it is believed that these cases are of general interest inasmuch as they throw light on the question of judicial application and interpretation of international law.

As a matter of historical interest, the earliest instance which has come to the notice of the writer of a resort by the court to the Executive for information outside the narrower ambit of conventional evidence, coupled with an incomplete or temporizing communication by the Executive to the court, occurred in *The Bolletta*[2] in 1809. There, the question at issue was the date of the cession of the Ionian Islands by Russia to France. The Court (Sir William Scott) observed that although regularly it was the business of the party making the assertion to adduce evidence of the fact on which he relied, yet in this case he should direct the King's Proctor (who had intervened in the proceedings) to apply to the Government for information, as in his official situation he could make the application with more facility than the other party concerned in the case. The King's Proctor later brought in the following answer which had been received from the Secretary of State:

'. . . the cession to France of the Ionian Republic was only made known to the British Government by the fact of its occupation by the French troops some months after the signature of the peace of Tilsit. It is not in the patent articles of that peace.'

On this, Sir William Scott observed: 'The answer which has been received is not very satisfactory as to the point at issue. . . . The time at which the cession may have taken place was not mentioned yet there is a distinct admission of the fact.' The Court then had to fall back on evidence of a more usual nature, namely, log books and affidavits.

[1] Oppenheim, *International Law*, vol. ii (7th ed. by Lauterpacht, 1948), p. 685, n. 5. See also p. 255, n. 2, *infra*.

[2] Edwards, 171.

I. *The basis of judicial knowledge*

The extent to which the Court will take cognizance of matters of state was fully canvassed in *Foster* v. *Globe Venture Syndicate Ltd.*[1] In that case the Court showed that it appreciated that the Crown is both the head of the Executive and the head of the Judiciary; what the Crown decides or discovers in its executive capacity must be known, or must be made known, to it in its judicial capacity. But the Court also recognized that the Crown might not have decided, or might not know, what was the answer to the question asked of the Court, namely, (1) whether the tribes of Suss were independent and (2) whether the territory called Suss was within the dominions of the Sultan of Morocco.

For the plaintiff it was contended that the Court is bound to know judicially whether a foreign state is or is not recognized as independent by the Crown, and if in doubt will apply to the Secretary of State for Foreign Affairs for information. For the defence it was said: 'The limits of judicial knowledge are well ascertained . . . and the Court will not go beyond them. The plaintiff is entitled to request the Court to ask the Foreign Office whether Suss is an independent State; but he is not entitled to ask whether Suss is within the dominions of the Sultan of Morocco. That is a question of boundaries which must be proved by evidence in the usual way.'

In his judgment Farwell J. said as regards the first question:

'. . . I am bound by the authorities which have been cited to take judicial cognizance whether the tribes are or are not independent, and if my personal knowledge is insufficient to instruct me on that point, then I have the authority of those cases for saying that the proper course is to apply to the Secretary of State for Foreign Affairs for information, and his answer . . . is conclusive on the parties. . . . I am asked to take judicial cognizance of the fact that, assuming these tribes to be independent, they do not possess jurisdiction over certain territories. That is a matter which it appears to me must necessarily be within the cognizance of Her Majesty, because, for the protection of her lieges in the ordinary way, she would know whether redress should be applied for to the Sultan of Morocco or to the head of the various independent tribes of Suss. Sound policy appears to me to require that I should act in unison with the Government on such a point as that. Assume that the Foreign Office have already satisfied themselves that the territory in question is within the dominion of Morocco, and have applied to the Sultan of Morocco for redress in any given matter, it would surely be improper that I, sitting here as a judge of the High Court, hold as a matter of fact that the territory in question was not within the dominion of the Sultan of Morocco. I should be contravening the act of Her Majesty acting as a Sovereign in a matter which is within the cognizance of Her Majesty's Foreign Office.'

The judge held that he would put the two questions to the Foreign Office. Nothing further of this matter is reported.

[1] [1900] Ch. D. 811.

II. '*Changing and difficult times*'

The ending of the First World War was accompanied by extensive territorial changes in Europe. Most of these were clear cut, but a number were disputed and for a time inconclusive. Three well-known cases—*The Annette*,[1] *The Gagara*,[2] and *Luther* v. *Sagor*[3]—echo the chaotic conditions in the north-eastern corner of Europe during that period. The British, or any other, Government must have been exercised whether, and how far, to recognize the contemporary administration of Russia and its newly formed succession states. However, the question does not seem to have arisen in an acute form in the English courts until 1919, when in *The Annette* it became necessary to discover exactly what was the Provisional Government of Northern Russia. Hill J. applied to the Foreign Office for a certificate in writing setting forth its status and position—'namely as to whether such government is one duly recognised by His Majesty's Government and has all the attributes of a sovereign state'. In reply, the Foreign Office wrote describing the Provisional Government and stating that it had not been formally recognized either by His Majesty's Government or by the Allied Powers as the government of a sovereign independent state. Hill J. was unable to draw from this the conclusion that the Provisional Government was (even 'informally') recognized as a sovereign state.[4]

That was a fairly simple and straightforward question and answer: perhaps implicit when the status of a 'provisional' government was in issue. It was otherwise with the government set up in the new state of Esthonia, to which the British Government had tentatively accorded some sort of recognition. On the question being raised in *The Gagara*, it was thought expedient to send both the Attorney-General and the Solicitor-General down to the Court to explain what His Majesty's Government were about. The Court had invited the assistance of the Foreign Office for information as to the status of the Esthonian Government. The Law Officers attended to inform the Court that His Majesty's Government had recognized that Government as 'a *de facto* body' and 'provisionally and with all necessary reservations as to the future'.[5] There appear also to have been 'carefully framed letters', mentioned but not reproduced in the Reports, from the Foreign Office to the Esthonian representatives.

Bankes L.J. expressed himself[6] as satisfied with the letters, and thought the statement by the Law Officers free from objection. The Attorney-General described[7] the position of the Esthonian National Council as 'of necessity

[1] [1919] P. 105. [2] [1919] P. 95. [3] [1921] K.B. 457. [4] [1919] P. 105, at p. 111.

[5] Leaving the Court to decide on the basis of general principles of international law the nature and status of a *de facto* body, and whether recognition could be provisional. Cf. Chen, *The International Law of Recognition* (1951), p. 235.

[6] [1919] P. 95, at p. 103. [7] At p. 104.

provisional and transitory'; while junior Counsel for the Treasury said: '. . . in the present view of His Majesty's Government, and without in any way binding itself as to the future, the Esthonian Government is such a government as could, if it thought fit, set up a Prize Court.' This last criterion one might think reduces recognition to a very limited attribute of sovereignty,[1] but it was all that was required to decide the case in litigation, and it satisfied the Court.

In the third case, *Luther* v. *Sagor & Co.*, the question at issue was recognition at large, recognition of sovereignty—the sovereignty of Russia—in its entirety. More than a year had passed since *The Annette*, and the British Government was moving towards recognizing the Soviet Government, although indeed the position in Russia itself was not yet quite clear. But the Government was still *in transitu*; and five or six inquiries had to be made before the Foreign Office deemed it expedient to express itself categorically. The first approach was made by the solicitors for Mr. Krassin, who obtained from the Foreign Office a letter stating that their client was the authorized representative of the Soviet Government and had been received by His Majesty's Government for the purpose of certain negotiations. The defendants' solicitors then communicated with the Foreign Office. They were informed that 'His Majesty's Government assent to the claim of the Delegation to represent in this country a State Government of Russia'. At the hearing of the action it was contended on behalf of the defendants that this amounted to a recognition of the Russian Soviet Republic as the government of a sovereign state. The plaintiff did not agree and his solicitors in turn wrote to the Foreign Office who in a third letter made it clear that the previous letters were 'expressions of opinion' which did not 'purport to decide difficult and, it may be, very special questions of law, upon which it may become necessary for the Court to pronounce'. The letter concluded: 'His Majesty's Government have never officially recognised the Soviet Government in any way.' In his judgment Roche J. remarked:[2] 'It was said on behalf of the defendants that these communications were vague and ambiguous. I should rather say they were guarded, but as clear as the indeterminate position of affairs in connection with the subject-matter of the communication enabled them to be.' To make sure, a further inquiry was made, by the Court itself, of the Foreign Office who replied that there was no further information which it

[1] It contains indeed much that is cryptic. The ship had been condemned as a prize of war, not by a Prize Court but by a decree of the Esthonian Government. On the legal point implied, perhaps, in counsel's remarks cf. Moore, *Digest*, vol. vii (1906), p. 587: 'a state may refuse to recognize the existence of a court of prize set up in a foreign territory', citing *The Nueva Anna and The Liebre*, 6 Wheat. 193 (refusal by the United States of America to recognize the existence of a Mexican republic or state at war with Spain, or the existence of a Court of Admiralty with authority to adjudicate on captures), and *The Lilla*, 2 Sprague 177 (proceedings of 'supposed tribunal' of the Confederate States not regarded as valid).

[2] At p. 477.

was desired to place before the Court. 'On these materials' the Judge was not satisfied that His Majesty's Government had recognized the Soviet Government.[1]

Another period of difficulty and uncertainty in the international relations of this country began in 1936 with the outbreak of the Spanish Civil War. A series of actions in which the status of the rival governments was called in question were heard while the war was still going on; and inquiries were made of the Foreign Office, whose replies, conditioned by the changing military and political situation, were for the most part intentionally evasive. The control of the territory of Spain by the Nationalists was progressive, and progressive also were the recognition of General Franco's Government and the withdrawal of recognition of the former, Republican, Spanish Government. The dual process is neatly reflected in the communication from the Foreign Office to the solicitors engaged in the case of *Banco de Bilbao* v. *Sancha*.[2] That letter stated:

'. . . the Government set up by General Franco in the Basque country . . . is now recognised by His Majesty's Government as the Government which exercises de facto administrative control over a considerable portion of the Basque country. . . . It appears that notwithstanding recognition by His Majesty's Government of the de facto position of General Franco's Government in this area, His Majesty's Government recognises the Republican Government of Spain as the de jure government of the whole of Spain including the area in which it recognises General Franco's Government as exercising de facto administrative control.'[3]

Clauson L. J., giving the judgment of the Court of Appeal, adopted this circumstantiated document without comment, saying:[4]

'This Court is bound to treat the acts of the government which His Majesty's Government recognize as the de facto government of the area in question as acts which cannot be impugned as the acts of a usurping government, and conversely the Court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognized by His Majesty's Government as the de jure government of the area as a mere nullity. . . .'

[1] On appeal, leave was given to adduce further evidence. A letter from the Foreign Office was put in, to the effect that H.M. Government now recognized the Soviet Government as the *de facto* Government of Russia. A request was then made to the Foreign Office for information whether His Majesty's Government recognized the Provisional Government of Russia as to the period of its duration and the extent of its jurisdiction. All this was answered categorically in a final letter ([1921] 3 K.B. 532, 541).

Another case in which the Government came to a decision at a moment when the proceedings had reached a late stage was *Haile Selassie* v. *Cable and Wireless Ltd.* (No. 2), [1939] Ch. 182; see p. 194. On the action coming before the Court of Appeal on 3 November 1938, the attention of the Court was called to the fact that, on the day before, an announcement had been made by the Prime Minister in the House of Commons that it was the intention of His Majesty's Government in a very short time to recognize the King of Italy as *de jure* Emperor of Abyssinia. The Court adjourned. The appellants' solicitors then received a certificate from the Foreign Office stating that His Majesty's Government no longer recognized the respondent as *de jure* Emperor of Ethiopia but now recognized the King of Italy as such.

[2] [1938] 2 K.B. 176.

[3] From 'statement of facts taken from the judgment of Clauson L.J.' at p. 181.

[4] At p. 195.

In *The Arantzazu Mendi*[1] the Foreign Office letter written in the case of *Banco de Bilbao* v. *Sancha*[2] was submitted to Bucknill J. who, however, rejected it and, after hearing argument, himself directed a letter to be sent to the Secretary of State for Foreign Affairs, paragraph 5 of which inquired 'whether the Nationalist Government of Spain is recognised by His Majesty's Government as a foreign sovereign state'.[3] The reply declined to give an opinion on the matter of law implied in paragraph 5, but answered it at some length by a series of eight statements starting: '(1) His Majesty's Government recognise Spain as a foreign sovereign State. (2) His Majesty's Government recognises the Government of the Spanish Republic now having its seat in Barcelona as the de jure Government of Spain'; and continuing (3) that that was the only Government so recognized, (4) setting out the status, claims, and objects of the Nationalist Government, (5) that that Government was recognized as exercising *de facto* administrative control over the large portion of Spain (6) including the Basque Provinces, &c., and concluding: '(9) The question whether the Nationalist Government is to be regarded as that of a foreign sovereign state appears to be a question of law to be answered in the light of the preceding statements and having regard to the particular issue with respect to which the question is raised.'

The Judge said:

> 'The question which I have to decide is the question of law whether these facts as proved by the letter from the Foreign Office . . . constitute, according to English law, the Nationalist Government as a foreign sovereign State. . . . It may well be that a neutral sovereign power cannot in terms recognize the independence of any government seeking to overthrow by force the de jure government without in some measure departing from its own neutrality. The armed struggle mainly concerns the very question of independence. . . .'

He pointed out that the Court of Appeal in *Banco de Bilbao* v. *Sancha* had treated the letter from the Foreign Office as a recognition of the Nationalist Government as the government *de facto* of the area in which Bilbao is situate, and in *Luther* v. *Sagor* had treated a government *de facto* as a foreign sovereign state. From this he deduced that the decision in the *Banco de Bilbao* case meant that the Nationalist Government of Spain was for the purposes of this case a foreign sovereign state. Ultimately he came to the conclusion that 'a Government which has acquired the position and power ascribed to the Nationalist Government of Spain in the letter from the Foreign Office to the Court' was for the purposes of this action a foreign sovereign state.

In the Court of Appeal[4] Goddard L.J., after pointing out that 'the proper

[1] [1938] P. 233.
[2] *Supra.*
[3] [1938] P. 233, at p. 242.
[4] [1939] P. 37.

course, and the only course', in cases of this kind was 'to inquire of the Secretary of State what His Majesty's attitude is pleased to be', continued:

'And it seems to me most desirable in these cases, that where a Court propounds a question of this sort to the Secretary of State, a clear answer should be given, if it be possible to give one. If of course His Majesty is not pleased to come to any determination on the facts, then the Court should be so informed.'

He thought that the facts set out in the present letter amounted 'beyond any question of doubt' to the fact that the Nationalist Government was a *de facto* sovereign state. He added, with the first note of criticism in this case of the form of reply adopted by the Foreign Office:

'It seems to me . . . that we are informed by the Secretary of State with sufficient clearness, though I could wish with a little more direction, that there is a de facto Government in the Nationalist Government of Spain. . . .'

In the House of Lords[1] no difficulty was found in accepting the certificate of the Foreign Office as sufficient for the purposes of the House. Lord Russell of Killowen, however, observed[2] that:

'The letter addressed to the Secretary of State was one which invited an answer to a question of fact, namely, whether or not the Nationalist Government of Spain was recognized by His Majesty's Government as the Government of a foreign sovereign State, but the answer . . . [in para. 9] poses another and quite a different question, namely, whether the Nationalist Government should be so regarded.'

Nevertheless, Lord Russell conceded that the paragraphs 5, 6, and 8 could lead to 'only one conclusion of fact, namely, that His Majesty's Government does recognise the Nationalist Government as the Government of a sovereign State which has the larger portion of Spain . . . under its exclusive authority and control'.

The effect of the judgment of the House of Lords in this important case is that the reference in the certificate of the Executive to matters of historical fact is to show that the answer to the court is a considered answer; the court will not use it to qualify an unqualified answer, even when it is unqualified only on the question of status and leaves other matters—such as immunity—to the court as matters of law. It will be observed, moreover, that the judges gave more weight to that part of the Foreign Office letter which spoke of recognition of *de facto* administrative control than they gave to the statements that His Majesty's Government continued to recognize the Republican Government as the *de jure* Government of Spain or that they had not accorded any other recognition to the Nationalist Government.[3]

It would appear to be axiomatic that parties to litigation cannot expect the Government to fight their action for them, but the plaintiffs in *White*,

[1] [1939] A.C. 256. [2] At p. 267.

[3] Cf. Chen, op. cit., p. 251, where he also points out that the letter contained contradictory assertions.

Child & Beney, Ltd. v. *British Dominions Insurance Company*[1] made a determined effort in that direction. Encouraged by the example of *Luther* v. *Sagor*,[2] they approached the Foreign Office for a statement as to whether one of the bodies which successively claimed to rule Russia in and after October 1917 had been recognized by the British Government as the Government of Russia. They went further and asked for a definition of the time from which and the area over which such government was established. In 1921 the United Kingdom recognized the Soviet Government as the *de facto* Government of Russia. How far recognition has a retroactive effect is a matter upon which jurisconsults are divided[3] and one upon which courts had not in 1921 often declared themselves.[4] It may well therefore be supposed that in the act of recognizing the Soviet Government the British Government did not concern itself closely with prescribing how far back, if at all, that act should be deemed to relate. Such a question, should it ever arise, could well be left to the courts to decide. In his reply to Messrs. White, Child & Beney, however, the Foreign Secretary did his best to enlighten them as to historical facts which were within his knowledge but declined, and declined again at a later stage when the question was put to him by the Court itself, to deduce from such facts propositions of a legal nature. The story of this case, which it seems worth setting out at some length, is as follows. The plaintiffs had money and bonds in a bank at Petrograd which were insured against loss or damage by (*inter alia*) 'civil commotions . . . civil war, revolutions, rebellions, military or usurped power', but the policy excepted claims for 'confiscation or destruction by the Government of the country in which the property is situated'. In December 1917 the bank and everything in it was seized under the direction of an 'Executive Committee of the Commissaries of the People'. The question therefore was whether the loss was a loss by 'rebellions, military or usurped power' or by confiscation by the Government of Russia. To answer this the Court had to decide whether the Russian Soviet Republic was at the time of the loss recognized by the British Government 'as a sovereign Government'. In the course of the hearing of the trial, two witnesses gave evidence of the happenings at the bank in Petrograd in December 1917. On 12 May 1921, while the case was pending, the Court of Appeal gave judgment in the case of *Luther* v. *Sagor*;[5] and on 18 May

[1] (1922), 38 T.L.R. 367. [2] *Supra.*

[3] See Lauterpacht, *Recognition in International Law* (1947), p. 59, and Chen, op. cit., pp. 170–86.

[4] As to the later repeated and emphatic application by municipal courts of the principle of retroactivity of recognition of governments, see Lauterpacht, *ubi supra*, p. 59, n. 1. For a more recent view see *Civil Air Transport Inc.* v. *Central Air Transport Corporation*, *infra*, p. 243, and a note on the early history of that case in *International Law Quarterly*, 4 (1951), at p. 172. See also the *Bogusławski* case, *infra*, p. 242. And see Chen, op. cit., pp. 170–86.

[5] [1921] 3 K.B. 532.

the plaintiffs themselves wrote to the Foreign Office a letter setting out a version of the course of events in Russia from December 1917 to January 1918, and asking the Foreign Office to let them have 'any information you can bearing on the accuracy or otherwise of the foregoing'. They added, altruistically enough, that 'the date of the retroactive recognition of the Soviet Government may become of supreme importance should that Government subsequently claim compensation for all acts committed by Great Britain against the Soviet Government' and concluded by asking for a copy of the letter sent by the Foreign Office to the Court in *Luther* v. *Sagor*. In a subsequent letter they asked specifically:

'(1) Whether you consider that the present Soviet Government is the Government of the country . . . or whether it is only a "usurped power" that has, however, succeeded . . .?

'(2) And to what geographical extent, as on the crucial dates [specified] the Soviet Council of Commissaries would be considered by His Majesty's Government as having been the government of the country?'

The Foreign Office replied on 10 June 1921 that 'while it is true that his Majesty's Government have recognized the Soviet Government as the *de facto* Government of Russia, they are unable to express any opinion as to how far this recognition is retroactive and to what extent it renders valid the decrees of the Soviet Government, these being questions for the decisions of the Courts.' A diary of events in Russia at the material times was enclosed, with the warning that it did not purport to decide the actual date on which the Soviet Government assumed the *de facto* government of the country, 'nor can his Majesty's Government express any opinion as to how far, or over what area, the power of the Soviet Government was effective, the questions being also questions of fact for the Courts to determine on the evidence laid before them.' Enclosed with the letter were a copy of the Soviet decree dissolving the Constituent Assembly and a copy of the Foreign Office letter to the solicitors concerned in *Luther* v. *Sagor*, all of which were submitted to and considered by the Court. Roche J., however,[1]

'. . . deemed it necessary (and also because I thought, with respect that the expression of opinion contained in the letter of June 10 that these matters of the status and extent of sovereignty of foreign Governments were for the Courts to decide, was a mistaken view and was opposed to the true view which had been laid down, not once, but a good many times in the Courts of this country) to seek further information from the Foreign Office.'

The Court therefore wrote to the Under-Secretary of State for Foreign Affairs:

'. . . The letter of June 10, 1921, states that a diary enclosed therein does not purport

[1] At p. 373.

to decide the actual date on which the Soviet Government assumed the *de facto* Government of the country. In the present case the critical point is as to such actual date, and Mr. Justice Roche is of opinion that the Courts must, as to this matter, resort for information to the Sovereign of this country acting through your Department. [The letter then referred to *Luther* v. *Sagor* and to the Foreign Office letter read and relied on in that case.] . . . I am therefore directed to inquire whether you are in a position to inform Mr. Justice Roche where and in what persons or body the sovereign executive and legislative power in Russia resided at [the material] dates.'

The Foreign Office replied:

'. . . Lord Curzon does not feel that he is in a position to give an answer to the question which has been put. He has already caused the litigants in the suits to be supplied with all the information in the possession of this department which bears upon the question at issue, and he does not feel that he is in any better position than the Court for drawing from those facts the correct deduction as to the moment at which the transfer of the sovereign authority in Russia to the Soviet authorities can be said to have become complete.'

Later, after dealing with material events in Russia, the letter adds, of the Central Executive Committee of the Soviets: 'This body, *so far as his Lordship has been able to ascertain from people living in Petrograd at the time*,[1] provisionally elected the Commissaries of the people', and concludes with an expression of Lord Curzon's regret 'that he feels unable to take the responsibility of answering the question which has been raised by Mr. Justice Roche, but he feels sure that the Court is fully qualified to draw the correct deductions from the facts and information, which have been supplied'. On this, Roche J. commented: 'I regret that I do not feel either qualified or entitled, still less bound, to answer the question for myself.' He did his best, however, reviewing 'evidence outside the Foreign Office communications' as well as the 'corpus of documents' to which his attention had been invited, and finally decided that 'As far as I can judge, the Russian Socialist Federal Soviet Republic did not come to birth until July 1918.' He added that, 'not being satisfied by any certificate or statement to that effect from the executive', he was unable to declare himself satisfied by any other available material that the exception as to acts of government applied, namely, that the seizure of the bonds did not constitute 'acts of revolution and military and usurped power'.[2]

[1] Author's italics.

[2] On 'the principle of such absolute incompetency that the Court even at the suggestion of the Foreign Office can make no decision of a fact bearing on the status of a foreign nation', see Jaffe, *Judicial Aspects of Foreign Relations* (1933), p. 223. But the Court of Appeal considered itself under no such disability. It held that the question what view was to be taken with regard to the position of affairs in Russia in December 1917 had been under consideration recently in *Luther* v. *Sagor* and so far as the Court came to any decision in the matter that decision would be binding in the present case. 'Of course that decision was on the facts as laid before the Court, and if the facts which were laid before the Court in the present case differed from those in the former case, it was open to the Court to arrive at a different decision. . . . Mr. Justice Roche had some further information than was before the Court in the former case.' But the Court of Appeal reviewed the facts without reference to the certificate of the Foreign Office (1922, 38 T.L.R. 617).

Two aspects of this case appear to call for comment. It was possible to call two witnesses, who gave evidence of what happened in October 1917 at the bank in Petrograd. For evidence as to how the Commissaries of the People came to be elected reliance was placed on the communication from the Foreign Secretary, who could do no more than quote from what had been told him by 'people living in Petrograd at the time'.[1] This is hearsay evidence of a kind which no litigant would be allowed to adduce[2] and it is submitted that if a party is unable to call direct evidence of the facts he is seeking to prove, he should not be able to invoke the assistance of the Foreign Office in the shape of a statement as to those facts embodied in a communication to the court. Not only is the party getting his evidence ready-made and 'on the cheap' but, since the communication is regarded by the court as conclusive, his opponent is placed at a disadvantage by being deprived of the opportunity of testing, by cross-examination, the evidence so introduced.

The second, and more satisfactory, aspect of this case is that the Executive, rightly, it is submitted, resisted the attempts of both the plaintiffs and the Court itself to induce it to pronounce on matters which it was for the Court to decide on the evidence before it.

III. *Matters of fact* versus *questions of law*

The proper reluctance on the part of the Executive to go beyond a mere statement of facts and embark upon matters of law is based on no recent precedent. So long ago as 1607 the Crown was warned by the Judiciary to leave questions of law to the judges whose business it was. Coke tells how, on the king, James I, being informed by certain parties that in any case where there is not express authority in law, the king himself may decide it in his royal person, Coke answered in the presence and with the clear consent of all the judges of England and barons of the Exchequer, that the king cannot adjudge in any case; but this ought to be determined and adjudged in some court of justice according to the law and custom of England. His Majesty was 'not learned in the laws of his realm of England and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law'.[3] Since this rebuke, the Executive have generally in their communications to the courts steered well clear of anything that partakes of the artificial reason and judgment of the law.[4] That has

[1] See p. 238, *supra*.

[2] For a contention that the communication of the Foreign Office concerning the status of a diplomatic person was hearsay, see *In re Suarez*, [1918] 1 Ch. 176, 186. The contention was rejected.

[3] Coke, *Rep.* 12, 63–65, Prohibitions del Roy.

[4] Professor Lauterpacht in his *Recognition in International Law* (1947) at p. 366 writes, if the passage is correctly understood, that in so far as it is a question of law, the practice has been to

sometimes been the case even when pressed by the Court itself to decide questions being questions of an international law nature which it finds peculiarly difficult. So it was in the *White, Child & Beney* case.[1]

It is on such occasions, when urged by the Court or by the parties to go beyond the bare statement of facts within its cognizance, that the Executive will often take refuge in the imprecise and temporizing form of certificate. At the same time, it does not by any means follow that when the certificate is precise and categorical, the party against whom it is raised is satisfied. This phenomenon is well exemplified by the *Bottrill* case.[2] Kuechenmeister, an interned German, contended that Germany was no longer a state and therefore he was no longer an enemy alien. The Attorney-General, who appeared for the Crown, thereupon handed in to the Court a certificate from the Foreign Secretary. The certificate set out the terms of paragraph 5 of the Allied Declaration of 5 June 1945 of the unconditional surrender of Germany and continued that 'Germany still exists as a state . . .' and 'His Majesty is still in a state of war with Germany'. It might be thought that these expressions were sufficiently precise and categorical, but Counsel for the applicant contended that matters of law arose on the certificate; he sought to show that it was for the Court to decide whether or not Germany still existed as a country and whether a state of war existed between that country and His Majesty. The Court refused, however, to go behind the certificate. In the Court of Appeal strenuous attempts were made by Counsel for the appellant to argue that the certificate was in some way ambiguous. He contended that the part of the certificate which affirmed the continued existence of the German state appeared to base that affirmation on the terms of the Declaration of June 1945. But the terms of the Declaration were quite inconsistent with the continued existence of a state after the summer of 1945. Asquith L.J. doubted whether the terms were so inconsistent, but assuming the contrary held that 'if in a certificate of this sort the conclusions are unqualified and unambiguous, it does not matter whether those conclusions are combined with, or even professedly based on, materials apparently inconsistent with them'. He drew authority for this from the *Kelantan* case,[3] where the certificate of the Secretary of State for the Colonies first recited a treaty in which the Sultan 'had seemingly surrendered some of the ordinary adjuncts or incidents of sovereignty' and then asserted that the Sultan

leave to the Crown the determination of the question—of mixed fact and law—whether a community possesses a sufficient degree of independence to acquire the status of a sovereign community in international law. It is with the greatest respect submitted that this goes too far in its assessment of the practice. With rare exceptions, English courts have not looked to the Executive for their law; they have desired to be informed as to facts to enable them to declare the law applicable to the facts of the case before them.

[1] *Supra*, p. 236.

[2] *R.* v. *Bottrill, Ex parte Kuechenmeister*, [1946] 1 A.E.R. 635.

[3] *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 207; *infra*, p. 246.

was a sovereign '(or an independent sovereign; they are the same thing)'.[1] It was there held that the former recital did not invalidate the later conclusion; and in the present case

'it is the conclusion which is operative even if—which I do not concede—it be a *non sequitur* from a preamble or premise which, in the certificate, precedes it. The conclusion is that His Majesty is still at war with a still existing German state.'[2]

In an earlier case—*Kawasaki Kisen Kabushiki Kaisha of Kobe* v. *Bantham S.S. Co., Ltd.*[3]—in which the question was that of the existence of a state of war between Japan and China, the Foreign Office had been less forthright in its certificate, showing reluctance to pronounce on what it considered to be a question of interpretation of an expression used in a document *inter partes*. The circumstances were, to be sure, unusual. In 1939 hostilities had been going on between China and Japan for some years. Both the belligerents took care to avoid a formal state of war between themselves, and third states refrained, for various reasons, from treating the contest as war. In particular, Great Britain did not regard the Sino-Japanese hostilities as constituting war.[4] These decisions were doubtless taken for political reasons and it can be presumed that the British Foreign Office would not have wished to deprive a private individual of any rights he may have had under, for example, an insurance policy by insisting that this pretence of 'no war' must be followed by the courts.

The *Kawasaki* case started as an arbitration arising out of a charterparty. In the course of the arbitration inquiry was made of the Foreign Office whether His Majesty's Government recognized that there was an outbreak of war in which Japan was involved, on certain dates. In reply, the Foreign Office stated that

'the current situation in China is indeterminate and anomalous and His Majesty's Government are not at present prepared to say that in their view a state of war exists. . . . The question of the meaning to be attached to the term war as used in a charterparty may simply be one of interpreting the relevant clause, and . . . the attitude of His Majesty's Government may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term "war" as used in particular documents or statutes.'

In a second letter it was stated that the views of His Majesty's Government regarding the legal status of the conflict in the Far East had not altered and that 'His Majesty's Government were not prepared to say that in their view a state of war existed'. In the result, the arbitrator made an award subject to the opinion of the Court on the question whether, on the true construction of the charterparty and on the facts found by him, he was

[1] But are they? See *infra*, p. 255.
[2] [1946] 2 A.E.R. 434, 438.
[3] [1939] 2 K.B. 544.
[4] See Oppenheim, *International Law*, vol. ii (7th ed. by Lauterpacht, 1952), pp. 293, 299.

entitled to award that on the material date war had broken out involving Japan.

Before Goddard J. (as he then was) the main point argued was that it was the duty of a judge to exercise judicial cognizance on the question whether the two foreign countries were at war, and that if his own knowledge did not enable him to answer the question he must apply to the Crown through the appropriate Minister; this was what had been done by one of the parties and the letters from the Foreign Office were conclusive. The Court, however, was 'far from being of opinion that they were conclusive. They merely said that His Majesty's Government suspended judgment on the fact.'[1]

The Court of Appeal made no adverse comment on the refusal of the Foreign Office to give a more definite reply. Sir Wilfred Greene M.R. pointed out that the Court was concerned not with the question whether His Majesty's Government recognized a state of war existing between China and Japan but only with the question of the true construction of a particular document, to which the Court proceeded without further reference to the certificate.[2]

An express refusal by the Foreign Office to deal with a legal question, namely, the retroactive effect of the recognition of a new government, was contained in the certificate given in *Bogusławski and Another* v. *Gdynia Ameryka Linie Żeglugowe Spółka Akcyjna*.[3] The certificate of the Secretary of State for Foreign Affairs stated:

'Up to and including midnight of July 5/6, 1945, His Majesty's Government in the United Kingdom recognised the Polish government having its headquarters in London as being the government of Poland, and as from midnight of July 5/6 His Majesty's Government in the United Kingdom recognised the Polish Provisional Government of National Unity as the government of Poland, and as from that date ceased to recognise the former Polish government having its headquarters in London as being the Government of Poland.'

Paragraph 2 of the certificate showed that the Polish Provisional Government was formed on 28 June 1945. Paragraph 3 stated: 'I am advised that the question of the retroactive effect of recognition of a government is a question of law for decision by the courts.' Finnemore J. approved of this last paragraph, saying:[4]

'It is quite true that the Secretary of State for Foreign Affairs, most properly and wisely no doubt, says at the end of his certificate that the effect of any retroactive effect of this recognition is a matter to be decided by the Courts'

[1] [1939] 2 K.B. at p. 549.

[2] At p. 544. He also pointed out that the wording of the letters showed that the Foreign Office would not be embarrassed by the Court's coming to its own decision (p. 549).

[3] [1950] 1 K.B. 157; [1951] K.B. 163 (C.A.).

[4] [1950] 1 K.B. at p. 174.

and in the Court of Appeal Cohen L.J. also expressed agreement with that part of the certificate.[1]

In the House of Lords[2] the company contended that the certificate did not delineate the moment at which the British Government recognized that one Government had ceased to have authority and another had begun. It meant only that at a particular moment the British Government realized that the new government had come into power and recognized it as then having control, but said nothing as to when that control began except what was found in paragraph 2. Lord Oaksey[3] rejected this construction of the certificate as contradicting the express statement in paragraph 1. He added:

'It is true that the recognition de jure by the British Government of a foreign government may in certain circumstances have a retroactive effect over a period before the recognition. In the absence of any intimation from the Foreign Secretary of the length of that period or the sphere in which the retroactive effect of the recognition is to operate it may be necessary for British courts to go into the facts on these matters.'

His Lordship proceeded to go into the facts and to examine the terms of the certificate.

Lord Morton of Henryton said:[4]

'If the Foreign Secretary had certified merely that His Majesty's government recognised the [new Polish Government] as the government of Poland, the recognition might well have a retroactive effect, and to ascertain the date from which such recognition became effective, it would be necessary for the court to go into past history and ascertain the date on which that provisional government acquired effective control of Poland. It seems to me, however, that no principle of retroactivity can come into operation in the case of a certificate in the terms of para. 1, which states in precise terms the moment 'as from' which the new government became the recognised government of Poland.[5] As I read the document, the Foreign Secretary has been at pains to exclude any possible retroactive effect. . . . Paragraph 3 is merely a statement of advice which has been given to the Foreign Secretary. I cannot see that it throws any light on the meaning of paragraph 1 . . . [it] would appear to have been inserted ex abundanti cautela to remove any idea that the Foreign Secretary was purporting to decide a question of law.'

In the following year there came before the Judicial Committee of the Privy Council[6] a case[7] in which the certificate of the Foreign Office adopted the same formula as in the *Bogusławski* case in describing the successive recognition by His Majesty's Government of two governments engaged in a civil war—recognition of one government of China up to midnight

[1] [1951] 1 K.B. at p. 173.

[2] *Sub nom. Gdynia Ameryka Linie Żeglugowe Spółka Akcyjna* v. *Bogusławski and Another* [1952] 2 A.E.R. 470. See also *infra*, pp. 462–4. [3] At p. 476. [4] At p. 477.

[5] The use of the expression 'as from' is new in certificates of this kind. 'If this be the new form, it seems to me, if I may say so with the utmost respect, that it is a very commendable form, because I should have thought that it settled the problem.' Finnemore J., [1950] 1 K.B. at p. 172. It was used again in the case next considered.

[6] Viscount Simon, Lord Normand, Lord Oaksey, Lord Reid, and Sir Lionel Leach.

[7] *Civil Air Transport Incorporated* v. *Central Air Transport Corporation*, [1953] A.C. 70. For the early history of this case, and the events which led up to it, see Aristeides, 'The Chinese Aircraft in Hong Kong', in *International Law Quarterly*, 3 (1950), p. 159. See also *infra*, pp. 464–70.

on a certain date and recognition thereafter of the other government as it was in the ascendant. Although, as will be seen, the certificate given to the Court of first instance which requested it shows every sign of an endeavour to be as precise and categorical as the circumstances would allow,[1] the two appeal courts felt constrained to put supplementary questions and to ask for explanations on points which they found obscure. The original request for information was made by the Supreme Court of Hong Kong, which asked certain questions[2] the answer to which concluded:

'I am advised that the effect of recognition by H.M. Government as stated in answer to questions 1 to 5 and in particular its retroactive effect (if any) are questions for the court to decide in the light of those answers and of the evidence before it.'[3]

On the hearing of the appeal the Full Court of Hong Kong asked a further question[4] which the Foreign Office did its best to answer, and when the appeal came before the Judicial Committee the latter posed a third question[5] to which the Foreign Office replied with all patience, and at some length.

The Judicial Committee held[6] that the effect of the three replies

'is to establish that, at any rate in the courts of Hong Kong and in the present appeal, the former Nationalist Government must be regarded as the sole *de jure* sovereign government of China up to midnight of January 5–6, 1950; that the present Communist Government was not the *de jure* government until that time; and that, while the Foreign Office, in its answer [to the Court of Appeal] acknowledged that from October 1, 1949, onwards the *de facto* government of those parts of China in which the Nationalist Government had ceased to be in effective control was the Communist Government, H.M. Government had not announced or communicated their recognition of the Communist Government as the *de facto* government over any part of China before they recognized the Communist Government as the *de jure* government of China on January 5–6, 1950.'

The first part of this finding suggests that the effect of the communications from the Foreign Office is felt in the courts concerned with the present case and not necessarily elsewhere; a noteworthy piece of judicial caution and a reminder that while courts decide cases they do not thereby recognize states or governments.

[1] A note on this case in *International Law Quarterly*, 3 (1950), at p. 162, calls the certificate 'exceptionally lucid and precise, partly as a result of careful formulation of the questions'.

[2] See [1953] A.C. at p. 86. The successive inquiries of and the replies given by the Foreign Office are fully set out below, pp. 467–9, and for reasons of space are not repeated here.

[3] This part of the Foreign Office certificate is a clear echo of the corresponding part of the certificate given in *A/S Tallinna Laevauhisus* v. *Estonian State Steamship Line* (1946), 79 Ll. L. Rep. 245, at p. 251, which after setting out the facts that H.M. Government recognized certain relationships between the U.S.S.R. and Estonia and that the Republic of Estonia as constituted prior to June 1940 had ceased *de facto* to have any effective existence, concluded: 'The effect of such recognition and in particular the date to which it should be deemed to relate back, appear to me to be questions for the court to decide in the light of the statements set out above and of the evidence before the court.'

[4] See p. 468, *infra*. [5] See p. 468, *infra*. [6] [1953] A.C. at p. 89.

V. '*Facts of a novel or complex nature*'

(*a*) *Before the Second World War*

In a long series of cases English courts have had to consider the anomalous and often ambiguous position of various member communities of the British Empire, particularly states in India and the Malayan Peninsula. When called upon to define the status of rulers of these states, secretaries of state have found it necessary to resort to the temporizing certificate. They have set out the relevant facts within their knowledge. Occasionally, when these facts have been more than ordinarily complex, they have enclosed with their communication to the court supporting documents such as treaties, constitutions, and so on, which leave status in doubt even in the mind of the Crown, and they have had to leave it to the court to decide, to interpret the documents and to deduce from them whether or not the ruler concerned is entitled to the immunity accorded to an independent foreign sovereign.[1]

In the first of these cases, *Mighell* v. *Sultan of Johore*,[2] the Court wrote to the Secretary of State for the Colonies in order to ascertain the status of the defendant. The reply, the purport only of which appears in the report, stated that Johore was an independent state and that the defendant was the present sovereign ruler thereof; and enclosed a copy of a treaty of alliance to show that the Sultan's relations with Her Majesty were not those of suzerainty and dependence. It concluded that the Sultan (these words are quoted in the judgment of Willis J.)[3] 'generally speaking, exercises without question the attributes of sovereignty'. The Court, however, did not accept the certificate of the Colonial Office as conclusive of itself; the Treaty also was examined and found to support the Colonial Office's view that the Sultan 'exercises attributes of a foreign ruler'.

Fifteen years later, in *Statham* v. *Statham*,[4] a certificate from the India Office as to the status of the Gaekwar of Baroda stated:

> 'The Gaekwar has been recognized by the Government of India as a ruling chief governing his own territories under the suzerainty of His Majesty. . . . The British government does not regard or treat His Highness' territory as being part of British India or His Majesty's dominions, and it does not regard or treat him or his subjects as subjects of His Majesty.
>
> 'But though His Highness is thus not independent, he exercises as ruler of his state various attributes of sovereignty, including internal sovereignty . . . subject to the

[1] This factor would qualify the cases considered in the present section for inclusion in the previous section, under the heading 'Matters of fact *versus* questions of law'. For to establish whether a state or a person is independent, is to establish a fact, but to decide whether a state or a person is sovereign, is to decide a point of law. Cf. Payot, *Les instructions du gouvernement lors de l'interprétation judiciaire du droit international* (1950), p. 62. He comments: 'La qualification juridique d'un fait est une question de droit qui devrait être laissée à la libre appréciation du juge.'

[2] [1894] 1 Q.B. 149.

[3] At p. 153.

[4] *Statham* v. *Statham and His Highness the Gaekwar of Baroda*, [1912] P. 92.

suzerainty of His Majesty . . . [and to certain rights and powers of the Government of India].'

The Court examined the expressions 'not independent' and so on and in particular considered the meaning of 'suzerainty' as described by Grotius, Vattel, and others, which 'aptly states the true status of the present Gaekwar of Baroda and is consistent with the status of that sovereign prince as defined by the certificate from the India Office'.[1] The Court then weighed up these expressions and their meanings to decide whether they constituted the Gaekwar an independent sovereign and so entitled to immunity from the jurisdiction. The certificate of the India Office was accepted as conclusive but the Court set to work to interpret it, that is, to discover whether it meant that the Gaekwar had that status which carried with it immunity from process.

In the *Kelantan* case,[2] the Court wrote to the Secretary of State for the Colonies requesting information as to the status of the Government of Kelantan. The letter in reply enclosed an Agreement dated 22 October 1910 regarding the relations between the King and the Sultan. It stated,[3] *inter alia*, that 'Kelantan is an independent State in the Malay Peninsula and His Highness the Sultan . . . is the present Sovereign Ruler thereof'. It went on to refer to certain agreements and treaties; to the assumption, with His Majesty's approval, by the Rajah of Kelantan of the title of Sultan, adding that he '. . . is now Sultan and Sovereign of the State of Kelantan' and finally stating that 'The Sultan in Council makes laws . . . [etc., etc.] and generally speaking exercises without question the usual attributes of sovereignty.' The letter was, it was contended, ambiguous. 'Notwithstanding the declaration of the independence of Kelantan, when the letter is read in conjunction with the [copies of treaties] enclosed with it, it shows that the state of Kelantan is not independent.'[4] The Attorney-General obtained leave to intervene and said:[5] 'The Colonial Office has sent forth no uncertain sound and if it has informed the Court that the state of Kelantan is a sovereign state, that is conclusive.' He added: 'Assuming that the letter is ambiguous (which is denied) the proper course is to apply to the Colonial Office for further information.' But the House of Lords did not think that there was any need for that. Lord Finlay thought that if the answer of the Executive was unequivocal, it did not matter that it referred to treaties and the like. He said:

'Of course the Colonial Office might have given a bald answer that the Sultan is a sovereign but it has been the practice when there are agreements or treaties dealing with the powers of the alleged sovereign to append to the reply on the question of

[1] [1912] P. 92, at p. 96.
[2] *Duff Development Co.* v. *Kelantan Government*, [1924] A.C. 207.
[3] It is set out in full in [1924] A.C. at p. 806.
[4] At p. 801.
[5] At p. 802.

sovereignty copies of any documents. There are very good reasons for this practice. The department might lay itself open to serious misunderstanding if it took any other course. It might be said that there was a want of candour in merely stating the conclusion that the Power is a sovereign Power without disclosing any such limitations on the sovereignty as exist here. The contention that by appending these documents the Colonial Office remits the question to the Court to form its own opinion is based on a misconception. When the letter and the documents are read together, it is clear that the Secretary of State says explicitly that the Sultan is a sovereign ruler and the documents are appended by way of making it clear that their effect has been considered and that the Colonial Office has given all due weight to them in arriving at the conclusion that the Sultan is a sovereign prince. There is no ground for saying that because the question involves considerations of law these must be determined by the Courts. The answer of the King, through the appropriate department, settles the matter whether it depends on fact or on law.'[1]

Lord Sumner, too, was prepared to accept the statement 'duly made in his Majesty's name' as sufficient according to its tenor, and went on to expound, in terms which have become classic, the position where, owing to political changes, the precise definition of the status of a foreign sovereign or state is a matter of some delicacy. He said:

'There may be occasions when, for reasons of state, full, unconditional or permanent recognition has not been accorded by the Crown and the answer to the question put has to be temporary if not temporising, or even when some vaguer expression has to be used. In such cases not only has the Court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions "sovereign" or "independent" sovereign used in the legal rule mean the same thing. . . .[2] I conceive that, if the Crown declined to answer the inquiry as in changing and difficult times policy might require it to do, the Court might be entitled to accept secondary evidence in default of the best. . . . In the present case there is a precise and sufficient statement as to the status of the Sultan of Kelantan, as recognized by His Majesty, with nothing ambiguous about it.'[3]

Only Lord Carson entertained misgivings as to the form of communication adopted by the Secretary of State: yet he accepted it to avoid chaos and confusion, purely practical reasons dictated by the fear of being not in accord with the policy of the Government.[4]

'My lords, I must confess that if it was open to me to disregard the statements contained in the letter . . . that "Kelantan is an independent State and the present Sultan is the present sovereign ruler thereof", I would find great difficulty in coming to that conclusion of fact, having regard to the terms of the documents enclosed in the letter. . . . It is in my opinion difficult to find in these documents the essential attributes of independence and sovereignty in accordance with the tests laid down by the exponents of international law.'[5]

[1] At pp. 814–15.
[2] Thus setting up a rule of evidence against the 'legal rule' of international law.
[3] At pp. 824–5.
[4] Cf. Payot, op. cit., p. 41.
[5] At p. 830.

For all that, he held that the courts must take judicial notice of the status of any other country in accordance with the information afforded them by the proper representative of the Crown, i.e. the letter is to be read and accepted without looking at the accompanying documents.[1]

(*b*) *After the Second World War*

The cases in which the certificate of the Executive has been considered in court since the end of the Second World War have not for the most part dealt with situations and problems arising out of the recognition or non-recognition of revolutionary governments or succession states. They have (with the exception of *R.* v. *Bottrill*,[2] the *A/S Tallinna* case,[3] and the *Bogusławski* case)[4] had again to do with the states of India and the Malayan Peninsula, but in their new position—the position which has resulted from the creation and independence of India and Pakistan, on the one hand, and the formation of the Federation of Malaya, on the other hand. To the element of complexity, then, has been added the element of novelty, which, in the case of Malaya especially, as will be seen, has served to make complexity more complex.

The first of these cases was *Kahan* v. *Pakistan Federation*[5] in which, the status of Pakistan being in question, the Court wrote to the Secretary of State for Commonwealth Relations asking for 'a certificate indicating whether Pakistan is an independent Sovereign State'. The reply stated that an independent Dominion of Pakistan was set up by the Indian Independence Act, 1947, under which and

'by reason of the Constitutional Conventions, which govern the practice in these matters, Pakistan is a self-governing country within the British Commonwealth of Nations, sovereign both in internal and in external affairs, linked with the United Kingdom, through a common allegiance to the Crown, but in other respects independent of it. In the view of the Secretary of State, therefore, Pakistan is an independent sovereign State.'

(It will be noted that the usual and approved formula 'recognised by His Majesty as an independent sovereign State' was not used.[6]) Slade J., however, accepted this certificate as conclusive evidence, for the purpose of the instant case, that Pakistan was an independent sovereign state.

There followed an action[7] against a defendant described as the Ameer

[1] For Chen, op. cit., p. 253, it is difficult to see why the Colonial Office appended a copy of the agreement to its letter if no other construction was to be placed on it than that given by the Colonial Secretary.

[2] *Supra*, p. 240.

[3] In *A/S Tallinna Laevauhisus and Others* v. *Estonian State Steamship Line and Another* (1946), 79 Ll. L. Rep. 245, 80 Ll. L. Rep. 99. See *supra*, p. 244.

[4] *Supra*, p. 242.

[5] [1951] 2 K.B. 1003.

[6] It is also interesting to speculate what the Secretary of State meant by the word 'therefore' in the last sentence of the quotation from his certificate.

[7] *Sayce* v. *Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*, [1952] 2 Q.B. 390.

Ruler of Bahawalpur State, who claimed immunity as the ruler of a sovereign state. The Court applied for information to the Commonwealth Relations Office, who wrote in reply a letter[1] which set out the history of the State of Bahawalpur, which before 1947 was under the suzerainty of His Majesty, referred to *Statham* v. *Statham*[2] and set forth the constitutional changes in the position of the Ameer brought about by the Government of India Act, 1935, the Indian Independence Act, 1947, an instrument of accession to Pakistan and certain further instruments which the Ameer had executed in pursuance of section 6 of the Acts. The letter outlined the constitutional position of the Ameer and his state as a result of all these instruments and concluded:

'In these circumstances I am to say that the State of Bahawalpur is not a part of His Majesty's Dominions and that the Ameer, within the limitations imposed upon him by the constitutional arrangements set out above, is sovereign ruler of the State.'

Once again the formula 'recognised by His Majesty' is not used. On the other hand, the certificate does not go so far as to say that the Ameer was an independent foreign sovereign. McNair J., at first instance,[3] held that the statement of the Commonwealth Relations Office precluded him from considering the difficult question of the status of component parts of the Federation of Pakistan, or how far the recognition accorded in the present case was consistent with the recognition accorded to Pakistan as reported in *Kahan* v. *Pakistan Federation*.[4] He said:

'In my judgment the final paragraph of the letter . . . contains a clear and unequivocal statement made on behalf of His Majesty on two points: (1) that the State of Bahawalpur is not part of His Majesty's Dominions, (2) that the Ameer within the limitations imposed upon him by the constitutional arrangements set out in the letter is sovereign ruler of the State.'

On appeal, Somervell L.J.[5] quoted from the speech of Lord Cave in the *Kelantan* case[6] and from that of Lord Atkin in *The Arantzazu Mendi*.[7] He then answered certain criticisms of the letter from the Commonwealth Relations Office made by Counsel for the plaintiff. In particular he did not think that there was any ground for criticism in the fact that the communication included the views of the Pakistan Government. He said:

'That Government had come to an arrangement, as will be seen, with the Ruler of Bahawalpur state. . . . I think they were in an authoritative position to assist the court through the Commonwealth Relations Office in the decision of this question.'

[1] Neither the terms of the request nor those of the reply appear fully from the report. It is submitted that it would be helpful if law reporters made it a rule always to reproduce the terms of a request to a governmental department, stating who made the request and also the terms (if only so far as relevant to the report) of the communication in reply.

[2] [1912] P. 92.

[3] [1952] W.N. 62.

[4] *Supra*, p. 248.

[5] [1952] 2 Q.B. 392. Jenkins and Morris L.JJ. concurred.

[6] [1924] A.C. 797, 808, 815; see p. 246, *supra*.

[7] [1939] A.C. 256, 263; see p. 234, *supra*.

He quoted with approval the dictum of McNair J. cited above and went on to consider the legislative changes, and in particular the Instruments of Accession, referred to in the letter; he explained that in making this examination he was in no way inconsistent with the principles laid down in the *Kelantan* case,[1] where the relations which existed between His Majesty's Government and the Government of Kelantan were examined, adding:

'and it is proper, I think, that they should be explained and in any necessary document set out by the relevant Government department to assist the court. It enables one to see that the proper matters have been considered and have been before the proper Ministers.'[2]

In effect, the position with regard to 'sovereigns' who are also in that capacity members of federations and subject in some respects to their constitutional rules, and may also even, in other capacities, be subjects of a third sovereign, is that it is obviously necessary not only to certify the recognition of their 'sovereignty' but to supply the court with information on the particular facts. This is not only in order to enable the court to satisfy itself that the Secretary of State has addressed his mind to the right matters before advising Her Majesty and certifying her decision. It is also in order that the court may understand exactly what the certificate means; in particular so that it may be made aware whether the particular matter 'impleads' the foreign 'Sovereign' either in his person or in matters which he can deal with in that capacity or only concerns things of a private law nature[3] to which his 'sovereignty' is irrelevant.

The third and most interesting of these cases again turned on the position and status of a Sultan of Johore.[4] It went ultimately to the Judicial Committee of the Privy Council. The Court of first instance not only expressed the view that the communications received from the Colonial office were insufficient replies to its questions; it intimated that the letters could and should have gone further. The Court, moreover, refused immunity to the appellant on the ground, *inter alia*, that there was not produced such evidence in the form of a communication from the Colonial Office as proved that he was entitled to immunity. The history of the litigation is as follows. The Sultan applied for certain proceedings commenced against him to be set aside on the ground that he was a sovereign ruler. The Court

[1] *Supra*, p. 246.

[2] At p. 397.

[3] Such as, for example, whether he is entitled on intestacy or under an English will to an estate in this country, or to an English dignity.

[4] *Abubakar and Others* v. *Sultan of Johore*, High Court of Singapore (1949), 15 Malayan Law Journal, p. 187; Court of Appeal (1950), 16 ibid., p. 3; on further appeal to the Privy Council, *sub nom. Sultan of Johore* v. *Abubakar, Tunku Aris Bendahara and Others*, [1952] A.C. 318. It appears that the appellant was the son and the first respondent the grandson of the Sultan of Johore who was involved with Miss Mighell: see *supra*, p. 245.

then inquired of the Secretary of State for the Colonies 'whether His Highness the Sultan of Johore is or is not an independent sovereign ruler'. The Secretary of State replied by a letter which stated, first, that Johore was a state in the Federation of Malaya[1] and that 'His Majesty's Government recognises . . . Sultan of Johore as the ruler of the State. As such he exercises attributes of sovereignty.'[2] It then set out the position of the state of Johore as under the Federation of Malaya Agreement, 1948, and the position of the Sultan under the Johore Agreement, 1948; and stated that the relations between His Majesty and the Sultan of Johore were regulated by those two Agreements and, so far as not inconsistent with them, two Agreements dated in 1885 and 1914 respectively. Such relations were summarized and the letter concluded by pointing out that the independence of the state of Johore and the sovereignty of the Sultan, as recognized in the earlier case of *Mighell* v. *Sultan of Johore*, [1894] 1 Q.B. 149, 'are subject to the limitations consequent upon fresh rights and obligations under the Agreements of 1948, and generally upon the position of the State as a member of the Federation of Malaya'. Copies of the four Agreements referred to were enclosed with this letter.

The parties to the action, after seeing the letter, requested that further information be sought upon the question 'Whether his Highness was an independent sovereign ruler at the time which is material to these proceedings in 1947, before the agreements of 1948 came into force.' The Secretary of State in a letter to the Court answered the question put by the parties by referring to the two Agreements of 1885 and 1914 mentioned above, to a Constitution enacted in 1895, and an Agreement dated 20 October 1945 between His Majesty and the Sultan of Johore (which granted the former 'full power and jurisdiction within the State of Johore'). The letter concluded by showing that in 1947 the position was as follows: The Malayan Union Order in Council, 1946, preserved the existing laws, subject to the provisions of the Order itself. One of the existing laws was the Constitution of the State of Johore. The precise extent to which the

[1] It may be useful to outline the position of the State of Johore. The British and British Protected Territories in South-East Asia are located principally in the Malay Peninsula and in the Island of Borneo and consist of the following five separate units: (1) The Federation of Malaya, composed of the nine British Protected Malay States of Johore, Kelantan, &c., and the two British Settlements of Penang and Malacca, which were formerly part of the Crown Colony of the Straits Settlements; (2) The Colony of Singapore, formerly one of the Straits Settlements; (3) The Colony of Sarawak; (4) The Colony of North Borneo; and (5) The British Protected State of Brunei. The five Territories are politically and administratively separate but are included in the area of authority of the Commissioner General for the United Kingdom in South-East Asia, whose functions are to ensure co-ordination of policy and administration throughout the area under British control. It will be seen that Johore is a member state of a federation; it is also in the position of being a protected state in that it has by treaties transferred the management of some of its more important affairs—defence and foreign relations, for example: see Clause 3 of the Johore Agreement, 1948—to the British Crown.

[2] An expression which is thought to mean something less than 'he is a sovereign ruler'.

provisions of the Constitution were preserved by the Order of 1946 'being a matter of legal interpretation is one upon which the Secretary of State feels that it would not be proper for him to pronounce'. Then: 'His Majesty's Government, however, recognise that the Sultan of Johore possessed sufficient sovereignty in and over Johore to enable him to make . . . the Johore Agreement, 1948.' And finally: '. . . under . . . the Order in Council . . . the position of Johore as an independent State and the sovereign powers of the Sultan were materially affected by the incorporation of the State in the Malayan Union and generally by the . . . Agreement of 25 October 1945; but that the State retained its identity and the Sultan possessed certain attributes of sovereignty.'

It will be observed that in both of these letters the Secretary of State refrains from directly answering the question put to him by the Court, namely, whether the Sultan is or is not an independent sovereign ruler. He points to the various legislative and contractual instruments which define the Sultan's position; he states that His Majesty 'recognises the Sultan of Johore as the ruler of the State' and that His Majesty's Government recognized that the Sultan possessed sufficient sovereignty in and over Johore to make the Agreement of 1948; and he states that the Sultan 'exercises attributes of sovereignty' or, in 1947, 'continued to possess certain attributes of sovereignty'. Just as, however, the Secretary of State expressly refrains from pronouncing on the question how far the Constitution of Johore was preserved by the Malayan Union Order in Council, as being a matter of legal interpretation, so he tacitly leaves to the Court the question whether, having regard to the matters which he has disclosed, the Sultan is in law an independent sovereign ruler. In giving the judgment of the High Court of Singapore Gordon Smith J. seems to resent the attitude taken by the Secretary of State. He complains that the latter

'does not answer the questions asked by the Court and which the Court was entitled to ask and entitled to receive an answer. Any such answer would have been accepted by the Court as conclusive, instead of which there are long factual statements and an equivocal answer to the question put. The burden of answering the question is, therefore, cast on this Court, anyhow, in the first instance.'

Whatever the meaning of the last five words quoted, the learned Judge took up the burden and 'had no hesitation' in saying that the Sultan 'abandoned . . . his position and status of an independent Sovereign Ruler' by the Agreement of 1945, prior to which he had been 'an independent Sovereign Ruler with the usual attributes of sovereignty', subject to the 1885 and 1914 Agreements. Gordon Smith J. went on to examine the status of the Sultan first under the Japanese occupation and then under the Federation of Malaya Order in Council, 1948, and the Federation Agreement of 1948. He then considered the general position of sovereign

states and not-full sovereign states including protectorates, such as the Malay States; and concluded that

'His Highness is a sovereign Ruler and he is entitled to the privileges and prerogatives usually accorded to such a sovereign ruler and which by international comity induces [*sic*] every Sovereign State to respect the independence and dignity of every other sovereign state.'

The respondents appealed to the Court of Appeal on a number of grounds, of which those presently relevant may be summarized thus: (1) the only question before Gordon Smith J. was the construction of the Colonial Office letters; (2) he had no duty to interpret other documents; (3) the letters were conclusive and he could not go behind them; (4) they answered the question put by the Court. In the Court of Appeal Murray-Aynsley, Chief Justice of Singapore, first examined the certificates given in the earlier cases of *Mighell* v. *Sultan of Johore*,[1] *Foster* v. *Globe Venture Syndicate*,[2] *Statham* v. *Statham*,[3] *Luther* v. *Sagor*,[4] and *Duff Development Co.* v. *Kelantan Government*,[5] in all of which certificates were given by the Colonial (or the Foreign) Office as to the recognition of a foreign sovereign (or of a foreign government) and were accepted by the Courts as conclusive. He then quoted the dictum of Lord Sumner in the *Kelantan* case:

'I conceive that if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the Court might be entitled to accept secondary evidence in default of the best.'[6]

He commented, however, that 'in case of status, no other evidence is possible'. The letters from the Secretary of State were not such as to constitute an answer in the affirmative to the question whether the status of the appellant was such as to oust the jurisdiction of the Court (as had been the answers in *Mighell's* case and the *Kelantan* case).

Sir H. C. Willan, Chief Justice of the Federation of Malaya, in the course of his judgment also commented on the fact that there was no unequivocal answer from His Majesty's Government as to the status of the Sultan. He held, however, that the Court was not in such a case precluded from looking to other evidence and proceeded to consider, by reference to various authorities and instruments, whether the Sultan is or is not an independent sovereign. He came to the conclusion that he is and was at the material times such a sovereign.

The third Judge, Evans J., delivered a judgment agreeing that the Court could not look beyond the letters of the Colonial Secretary; he was not satisfied that the Sultan was recognized by His Majesty as an independent sovereign; and was relieved to be able to decide the case on another point

[1] [1894] 1 Q.B.D. 149.
[2] [1900] 1 Ch. 811.
[3] [1911] P. 92.
[4] [1921] 1 K.B. 456.
[5] [1924] A.C. 207.
[6] *Supra*, p. 246.

which had been raised, the question of waiver of immunity—'a point of substantial justice rather than one of mere political theory'.

Subsequent to the judgment and order of the Court of Appeal, correspondence passed between twelve Rulers of the Malay States and the then Colonial Secretary in which the former complained that the replies hitherto sent from the Colonial Office in answer to the request of the courts in Singapore for information as to the status of the Sultan were ambiguous, and that the Secretary of State, instead of issuing the required certificate, appeared to wish to leave the courts to decide the matter in the light of the recent establishment of the Malay Federation. However, the Secretary of State eventually wrote a further letter to the Rulers of the Malay States in which it was categorically asserted that

'His Majesty's Government regard your Highnesses as independent sovereigns in so far as your relations with His Majesty are concerned.'[1]

The Sultan appealed to the Privy Council, where it was submitted on behalf of the Sultan that the communication 'puts beyond doubt the sovereignty of the Sultan of Johore'.

Counsel for the respondents accepted the letter as recognition of the sovereignty of the Sultan at the date it was written. The following comment on the letter was made in the course of the judgment of the Privy Council.[2]

'At the hearing before the Board this document was tendered . . . without objection from the respondents, as containing the necessary and conclusive information from the proper quarter. Their Lordships so accept it and take judicial notice of the fact so certified. They can therefore proceed on the admitted basis that the appellant was recognized by His Majesty's Government at the relevant time as an independent sovereign entitled to the immunities in respect of litigation which attach to that status. This renders it unnecessary to decide in this appeal a point on which some difference of opinion appears to be expressed in the speeches of the majority in *Duff Development Co., Ltd.* v. *Kelantan Government*,[3] namely, whether the status enjoyed[4] by a foreign sovereign in a British court can be established, in case of doubt, only by a certificate issued by the appropriate Secretary of State on behalf of the Crown, or whether a court might be entitled, if the Crown failed to answer the inquiry in conclusive terms, to accept and act on "secondary information of another kind".'[5]

There is no doubt that the two letters from the Colonial Office in the present case were 'temporizing' answers to the Court. The Secretary of State is, as we have seen, entitled to send such a communication 'in changing and difficult times' and it may be said that in the Malay Peninsula the years between 1945 and 1949 were 'changing and difficult times', as appears from the documents in this case. But the learned Editor of Oppenheim's

[1] The above summary is taken from the judgment of the Privy Council, [1952] A.C. at p. 340.
[2] Lords Simon, Porter, Oaksey and Radcliffe, and Bucknill L.J.
[3] *Supra*, p. 246.
[4] It is respectfully submitted that the status of a foreign sovereign is established but it is his immunity which, if granted, is enjoyed.
[5] [1952] A.C. at p. 340.

International Law[1] would not limit the right to send a temporizing communication to such times. He writes:

> 'When, as occasionally happens, the statement of the Foreign Office lacks in clarity on account of the novelty or the complexity of the facts which it is requested to certify, the Court is presumed to have the power—and the duty—to interpret the certificate in accordance with the principles of International Law applicable to the situation.'

It is submitted that the facts which the Colonial Secretary was asked by the Singapore Court to certify were so complex (and, it may be, novel) as to throw on the Court the duty indicated in the passage just quoted.[2] In any event, the statement of the Secretary of State in a case such as this can be conclusive only on the question of fact whether a foreign ruler is or is not recognized by Her Majesty. It must always be for the court to draw the appropriate legal conclusions from the information thus supplied for it. It is not indeed, as has been shown, any part of the function of an officer of the Crown to express himself on legal questions, and the Secretary of State is right in declining to enter on the province of the court. It should be recalled, moreover, that independence and sovereignty are not always the same thing, especially in instances of 'not-full sovereigns'.[3] Further, there is room for the view that independence is a matter of fact, sovereignty a matter of law. In his replies to the Court at Singapore the Colonial Secretary pointed to all the documents—treaties, Orders in Council, &c.—which affect the independence of Johore and added the further facts that His Majesty's Government recognized the Sultan as the ruler of the State and that as such he exercises attributes of sovereignty, leaving it to the Court to deduce from them whether, and to what extent, the Ruler was and remained in law a sovereign. Put another way, the Secretary of State showed that the Malayan Rulers had by these treaties and so on surrendered a certain amount of their independence and therefore presumably of their sovereignty. It was for the Court to determine as a matter of law whether they retained enough sovereignty to render them immune from the jurisdiction, 'having regard to the particular issue with respect to which the question is raised'.[4]

It is further submitted that the Secretary of State for the Colonies could go no further than he went in his letters to the Court of Singapore because he could not know what view was taken by that Court or by any other

[1] Vol. i (7th ed. by Lauterpacht, 1948), p. 685, n. 5.

[2] See also the authorities referred to at the end of the footnote cited and Lauterpacht, *Recognition in International Law* (1947), pp. 364–6.

[3] Lawrence, *Principles of International Law*, 7th ed. (1930), p. 116, seems to suggest this when he writes of part-sovereign states that 'limitations on their external sovereignty are also limitations on their independence'. See also the remarks of Viscount Finlay in the *Kelantan* case, at p. 814.

[4] See *The Arantzazu Mendi, supra*, p. 234.

court of the oversea territories of the Crown[1] of such a question as sovereignty, and in particular how completely a person must be a sovereign before he is entitled to claim immunity from the jurisdiction. That is a question to which the courts of the Commonwealth, operating under different systems of law, may give different answers. The communication which the Secretary of State, that is to say, the Crown, makes to the court, on the other hand, must be the same whatever law it is that the court administers.

The certificates given in the case under review showed that His Majesty's Government had recognized the Sultan of Johore as independent, but also that there was some qualification on his sovereignty. It was left to the Court to determine whether the Sultan retained the kind or amount of sovereignty that carried immunity. The certificate showed that there was between His Majesty and the Sultan the relationship normal in this type of case. What legal effects flow from that relationship and the fact that the State of Johore is a member of a Federation, was for the Court to decide, and it was for the Court to apply the law as they found it.

We have seen how the Executive tends to display a becoming reluctance to enter on questions of law when approached with an inquiry by the

[1] This refers to colonial courts rather than to those of the self-governing Dominions, where inquiry can be made of the appropriate government department in the Dominion capital, and it applies to other questions than that of sovereign immunity. The following are recent examples: (*a*) Colonial Courts: *The Cristobal Colon*, Supreme Court of Bermuda, W. & N. J. 1939, No. 96; *Annual Digest*, 1919–42, Suppl. Vol., Case No. 83 (certificate of the Colonial Secretary's Office, Bermuda, on the authority of the Principal Secretary of State for the Colonies, as to recognition of the Spanish Republican Government as the Government of Spain); *Yeo How Sam* v. *Chop Bee Huat*, Supreme Court of Singapore, [1947] S.L.R. 10; *Annual Digest*, 1948, Case No. 2 (certificate of the Special Commissioner for South-East Asia (see *supra*, p. 251, n. 1), as local representative of the Foreign Office, as to the date in 1942 on which the Island of Borneo was completely occupied by the Japanese Forces); *Allied Company* v. *Netherlands Indies Government*, Court of Appeal of Singapore, [1947] S.L.R. 97; *Annual Digest*, 1948, Case No. 13 (certificate of Foreign Secretary as to sovereignty of the Queen of Holland over the Netherlands East Indies); and the *Civil Air Transport Case* (*supra*, p. 243), Supreme Court of Hong Kong (certificate of the Foreign Secretary as to the recognition of rival Chinese Governments); (*b*) Dominion Courts: *Re Ortoli*, Supreme Court of New South Wales, *Weekly Notes*, 59 (N.S.W.), p. 156; *Annual Digest*, 1919–42, Suppl. Vol., Case No. 6 (certificate of the Secretary Department of External Affairs (under the National Security Act), regarding the Free French National Committee); *Anglo-Czechoslovak & Prague Credit Bank* v. *Janssen*, Supreme Court of Victoria, Australia (1943), V.L.R. 185; (1943), A.L.R. 427; *Annual Digest*, 1943–5, Case No. 11 (certificate of the Minister of State for External Affairs of the Commonwealth as to recognition of German control of Czechoslovakia); *Mrs. Levin Ltd.* v. *Wellington Co-operative Book Society*, Supreme Court of New Zealand, [1947] N.Z.L.R. 83; *Annual Digest*, 1946, Case No. 134 (certificate of Minister of External Affairs that 'active hostilities' ceased on 2 September 1943); *Van Heyningen* v. *Netherlands Indies Government*, Supreme Court of Queensland, Australia, [1948] Q.W.N. 19; *Annual Digest*, 1948, Case No. 43 (certificate of Secretary of External Affairs as to the source of the powers of the Netherlands Indies Government); *Estonian State Cargo and Passenger S.S. Line* v. *Laane and Baltser* (*The Elise*), Exchequer Court of New Brunswick and Supreme Court of Canada, [1948] C.E.C.R. 435; [1949] S.C.R. 530; *Annual Digest*, 1948, Case No. 50 (certificate of the Secretary of State for External Affairs in Canada as to the recognition by the Government of Canada of the incorporation of Estonia in the Union of Soviet Socialist Republics).

Court.[1] But this is far from being an invariable rule. In the *Bottrill Case*[2] the Foreign Secretary wrote: 'Germany still exists as a state', and 'His Majesty is still in a state of war with Germany'.[3] These may be regarded as two categorical statements of a kind which might very well have been left to come as findings of the Court. In strictness, to avoid any appearance of intruding on the province of the judicature, the use of some such expressions as 'His Majesty recognises Germany as still existing as a State' or 'His Majesty still regards himself as being in a state of war . . .' might have been preferable.[4] But such an objection is perhaps little more than pedantry. The relationship between Crown and courts is no more rigid than any other aspect of the British Constitution. And—despite Coke's admonition[5]—it is idle for the Crown to pose as being entirely without legal knowledge. Her Majesty has after all her legal advisers, the Law Officers, who once intervened to argue the law in *The Parlement Belge*[6] and again in *Musmann* v. *Engelke*,[7] in both of which cases precise and categorical certificates had been furnished by the Foreign Office.

Conclusions

Certain conclusions, it is suggested, may be drawn from the foregoing survey of the practice of the Executive and the courts respectively regarding certificates which are of an imprecise or 'temporizing' nature. In the first place, the court, when faced with the task of arriving at a decision involving questions of an international law nature, has the right—but probably not the duty—to seek the assistance of the Executive. The statement that there may be no duty on the court so to do, perhaps needs some examination. Writing in 1933 Professor Lauterpacht suggests that there may be 'a legal duty of courts to refrain from determining the existence of certain legally relevant facts incidental to the main issue and to rely for their determination on the statement of the competent executive department'.[8] In 1947 he writes: 'the practice has been to leave the determination of the status in international law of a [given community] to the Crown'.[9] How far does the settled practice of the court in this matter constitute such a rule of law as imposes a duty on the court itself? During the past hundred

[1] 'The Executive seldom claims the right to decide the legal implications of international facts': Chen, *The International Law of Recognition* (1951), p. 250.

[2] *Supra*, p. 240.

[3] *Supra*, p. 240.

[4] Cf. Greene M.R. in *The Arantzazu Mendi*, [1939] 2 K.B. at p. 554: 'War may break out without His Majesty's Government recognizing it. If His Majesty's Government had recognized that war had broken out it may be—and I say no more—that a statement to that effect by His Majesty's Government would be a matter which . . . the Court would be bound to accept.'

[5] *Supra*, p. 239.

[6] (1879), 4 P.D. 129.

[7] [1928] A.C. 433.

[8] *The Function of Law in the International Community* (1933), p. 388.

[9] *Recognition in International law* (1947), p. 366.

years or so the court has in a number of reported cases[1] managed to deal with questions of the recognition or the international status of governments and communities without any reference to the Executive. Thus, in the case of *The Ionian Ships*,[2] Dr. Lushington said:

'I proceed upon the assumption which I believe to be accurate . . . that all these islands were conquered by Great Britain during the war ending in 1815. I proceed on that assumption; whether Corfu surrendered at that time or some other I need not inquire. I proceed on the assumption that Great Britain dealt with them as conquered.'[3]

In *The Charkieh*[4] Sir Robert Phillimore did not communicate with the Foreign Office, and did not take kindly to a suggestion on the part of Counsel for the Khedive that he should do so,[5] until he had indulged in a considerable research into the history and constitution of Egypt and reached his own conclusion as to the status of the Khedive. It is true that twenty years later, in *Mighell* v. *Sultan of Johore*,[6] Lord Esher said: '. . . I am of opinion that he ought not to have done so', but he gave no reason for saying this and his brethren, Kay and Lopes LL.J., were silent on the point. Again, in *Republic of Peru* v. *Dreyfus*,[7] the Court assumed without inquiry of the Foreign Office not only that the revolutionary government of Peru of 1879 had been recognized by the British Government but also that it had been recognized by the French Government. Similarly, in *The Lomonosoff*,[8] on the question of the status of 'the Bolsheviks' who had overthrown the Government of Northern Russia, Hill J., without making any inquiry, said: 'At Murmansk on February 21 [1920] there was no government recognized by this country and indeed no established government at all', and of the Bolsheviks he observed: 'they were not acting with the authority of a politically organized society and certainly not with the authority of any politically organized society which at that time was recognized by this country'.[9] More recently, in *Murray* v. *Parkes*,[10] where the question was whether a person who claimed to have become a citizen of Eire could thereby have lost his former British nationality, Singleton J. examined the British Nationality and Status of Aliens Act, 1914, the Irish Free State Constitution Act, 1922, the Statute of Westminster and the Constitution of Ireland itself, and concluded: 'I fail to find anything to shew me that the Government which was set up in that part of Ireland which was formerly the Irish Free State has been recognized by His Majesty's Government as a sovereign independent democratic State.'[11]

[1] And one cannot leave out of account the probability that there have been many unreported cases of this kind.

[2] 1 Spinks Prize Cases 193; 2 Ecc. and Adm. 212; 8 St. Tr. 435.

[3] 8 St. Tr., at p. 464. [4] (1873), L.R. 4 A. & E. 59. [5] See 4 A. & E., at p. 65.

[6] [1894] 1 Q.B. 149, at 158. [7] (1888), 38 Ch. D. 348.

[8] [1920] P. 97. [9] At p. 105. [10] [1942] 1 K.B. 123.

[11] At p. 136. In his *Recognition in International Law* (1947) Professor Lauterpacht cites with some disapproval instances in which the certificate of the Foreign Office has used terms such as

These cases referred to above suggest that if reference to the appropriate department of the Executive is the settled practice, departures from it have been by no means unknown. There is nothing to suggest that similar instances will not recur in the future. In fact, there is even room for the view that the Court itself still feels that there is something out of the ordinary, something, however slightly, strange, in the practice of inquiring of the Foreign Office. Thus, in the *Civil Air Transport Case*,[1] the latest of the cases here noticed, the Board remarked:[2] 'This information was obtained as is usual from the Foreign Office in London', an observation, one feels, which would not be made of a procedure which was considered perfectly ordinary and normal.[3]

If, then, the court, while it has the right, is under no duty to apply to the Executive for the kind of information required in the cases which we have been considering, it is in a position parallel to that of the Crown, which similarly is under no duty to reply to the inquiries of the court. Nor should the court express disappointment if in a proper case the Crown should refuse the information requested of it. An analogy may perhaps be drawn from the examples given at the beginning of this article of the way in which a judge takes judicial notice of certain facts. If he consults a dictionary as to the meaning of a word of specialized application only to find that the dictionary does not give any, or any useful, definition, he does not complain of the uselessness of a rule that requires him to consult a book of reference. He accepts the fact that no assistance is to be obtained from that direction and applies himself to obtaining what he wants from other sources.[4] Similarly, in the words of Lord Sumner in the *Kelantan Case*,[5] 'if the Crown declines'—or, one may add, is unable—'to answer the inquiry . . . the Court might be entitled to accept secondary evidence in default of the best'. It is indeed submitted that the court is,

'insurgent government' and 'nationalist government' which are not known to diplomatic practice or international law. Here, 'sovereign independent democratic State' is an expression of judicial origin which may take its place alongside those just cited. For other cases in which no reference was made to the Foreign Office see *The Jupiter* (No. 3), [1927] P. 122, and *R.* v. *de Jager*, [1907] A.C. 326.

[1] [1953] A.C. 70.

[2] At p. 86.

[3] It is true that in *The Arantzazu Mendi*, [1938] P. 233, Lord Atkin said that he thought that 'not only is this the correct procedure by which the Court can inform itself on the material fact whether the party sought to be impleaded . . . is a foreign sovereign State . . .'. But four years later, in *Murray* v. *Parkes* (*supra*, p. 258), the Court, as we have seen, found another way. In the *Bogusławski case* (*supra*, p. 242), Lord Porter said: 'The proof of recognition must depend on the production of a certificate from the Foreign Secretary of this country pronouncing the fact of recognition [&c.]' ([1953] A.C. at p. 27). It will be interesting to see whether this is the last word on the subject.

[4] In the *A/S Tallinna case, supra*, p. 244, Atkinson J. remarked of the Foreign Office certificate: 'They have not quite appreciated what the question was that the Court had asked', viz. from what date the British Government had recognized the Government of the Estonian Soviet Socialist Republic to be the *de jure* Government of Estonia (77 LL. Rep. at p. 251). On appeal, Tucker L.J. discovered the date from the evidence given in the Court below (80 ibid. at p. 113).

[5] 1924 A.C. at p. 823.

not 'might be', entitled to seek such evidence *aliunde*. If it were otherwise then a contumacious Foreign Secretary could seriously hinder the work of the court, in despite of the doctrine of the independence of the judiciary.

In the second place, it is submitted that the temporizing certificate of the Executive both strengthens and extends the rule that any certificate given by the Executive is binding and conclusive,[1] subject to the gloss that it is binding according to its tenor. In other words, when it is categorical in its terms, it binds absolutely. When it is less than categorical, and it must be assumed that the failure to be categorical is deliberate on the part of the Crown, then the court is to that extent the less bound by it and is free to interpret it or add to its content from other sources. This is of particular importance in connexion with what may be called the 'two voices' principle. From early times it has been laid down that the Crown and the courts must speak in unison, especially with regard to foreign affairs. On the one hand, the sole organ of government which can speak for the state in its relations with foreign powers is the department of the Executive charged with those relations. And no court has either the power or the right to bind the state, of which it is another organ with differing functions, by making any declaration touching on foreign policy.[2] So in 1828, in *Taylor* v. *Barclay*,[3] Vice-Chancellor Shadwell refused to allow the Court to proceed on the representation that certain persons did form an independent government recognized by this country, when the Government of this country did not so recognize them. 'It appears to me', he said, 'that sound policy requires that the courts of the King should act in unison with the King', a sentiment echoed in 1900 by Farwell J. in *Foster* v. *Globe Venture Syndicate*:[4] 'Sound policy appears to me to require that I should act in unison with the government' on the question to whom certain territories in Morocco belonged. Again, in 1939, we find Lord Atkin saying in the course of his judgment in *The Arantzazu Mendi*:[5] 'Our state cannot speak with two voices . . . the judiciary saying one thing, the executive another.'[6] It is true that Lord Sumner, in the *Kelantan Case*,[7] said: 'This seems to be a maxim of politics rather than law', and Sir Wilfred Greene

[1] See Lyons, 'The Conclusiveness of the Foreign Office Certificate', in this *Year Book*, 23 (1946), pp. 240–81.

[2] Cf. Payot, op. cit., p. 65. But there is no doubt that the Executive will, nay must, follow the judgment of the court, complying with the law once the judiciary have declared what the law is.

[3] (1828), 2 Sim. 213. [4] [1900] 1 Ch. 811, 814. [5] [1939] A.C. 256, 264.

[6] Cf. McNair, 'Judicial Recognition of States and Governments and the Immunity of Public Ships', in this *Year Book*, 2 (1921–2), at p. 65: 'It is an axiom in international relations that a sovereign state cannot speak with two voices. And Lauterpacht (ibid., 10 (1929), at p. 84) adds: '. . . that of the executive and that of the courts. They are the same voice. The conclusiveness in relation to courts of statements by the Crown in certain matters bearing on international law is in the majority of cases only the necessary corollary of this principle.'

[7] [1924] A.C., at p. 826.

in the *Kawasaki Case*[1] expanded the idea behind that observation thus: 'I do not myself find the fear of the embarrassment of the Executive a very attractive basis on which to build a rule of English law.'[2] But is it only the Executive that would be embarrassed if a court were to decide in a sense opposite to that in which the Executive had declared itself? Certain it is that if a foreign state were to deem itself slighted by such a decision it would be the Foreign Office that would have to meet its protests and perhaps be involved in a diplomatic quarrel.[3] But the number of cases in which the Foreign Office has actually received protests from foreign states about adverse decisions cannot be large. On the other hand, if in a given case the certificate of the Foreign Office stated, for example, that in the view of Her Majesty's Government a state of war existed between two named countries, and a court held that it was not so, it could be very embarrassing not merely for the Crown, but also for other courts, who would be bound in other cases coming before them to follow that decision. We have seen,[4] however, that in its cautiously worded certificate in the *Kawasaki Case*[5] the Foreign Office stated that His Majesty's Government were not prepared to say that in their view a state of war existed between China and Japan. This left it open for the Court to find whether for the purpose of the case then before it China and Japan should be deemed to be at war. Its decision would then neither embarrass the Crown nor prejudge subsequent causes arising, it may be, out of different sets of facts.[6] The practice adopted by the Executive of issuing 'temporizing' certificates is thus seen to be an aspect of the 'two voices' rule, in that where there is room for varying legal interpretations of an international situation, the Court on receiving such a certificate can decide for itself without having to pay regard to any reaction which its decision might have on the Crown's conduct of foreign relations.

In this way justice is less likely to be denied to the parties in litigation. Which brings us to the third principle which emerges from the study of this type of certificate. It has been objected that there is some impropriety in referring to the Executive a dispute which the parties have submitted to the arbitrament of the judiciary. In *Musmann* v. *Engelke*[7] Lord Sumner said that he could not accept the Attorney-General's statement as to the

[1] *Supra*, p. 241. [2] [1939] 2 K.B. 544, 552.

[3] And indeed the courts are not afraid to pass on the action of the Crown, e.g. in prize (cf. *The Proton*, [1918] A.C. 578, or *The Stigstad*, [1919] A.C. 279) or to declare whether an Order in Council relating to prize is in conformity with international law (*The Zamora*, [1916] 2 A.C. 77). Cf. Jaffe, op. cit., pp. 41–51.

[4] In such a case, where the decision of the court one way or the other is likely to give offence to a foreign power then it is for the Foreign Office to decide whether it will intervene or, if approached by the court, give a certificate which, being categorical, will virtually decide the matter for the court or, being 'temporizing', may usefully relieve the Foreign Office of the responsibility for the decision.

[5] *Supra*, p. 241. [6] [1939] 2 K.B. 544. [7] [1928] 1 K.B. 90, 116.

result of the Foreign Office investigation into the type of work done at the German Embassy by Engelke. 'To do so would be to substitute a department of the Government for the Courts in a class of case where such substitution has never hitherto beeen recognised'—a remark from which it follows that such a substitution had been recognized in other classes of case. It occurs, for example, in actions commenced by a private individual which implead an independent foreign government or state, when the court, upon being satisfied as to the status of the defendant, remits the plaintiff to seek his remedy through the diplomatic channel.[1] Frequently the court does this upon a certificate of the Foreign Office describing the status of the defendant in such terms as leave no option to the court but to accord the immunity due to an independent foreign state. In such a case, if the certificate has been obtained, as it usually is, by the court or by the defendant, without the plaintiff's being heard on the matter, then he is deprived of his rights without his 'day in court'.[2] If, however, the certificate is 'temporizing' there is scope for argument on the point at issue, the plaintiff has his say, and justice is more manifestly seen to be done.

Fourthly, the cases which we have been considering show that the exact form of the wording of the operative part of the certificate is not important. In *Engelke* v. *Musmann*[3] Lord Phillimore said: 'My Lords, if I am not mistaken, when a question arises in the Law Courts as to whether a ruler is a Sovereign, and a proper Secretary of State is consulted, the right answer is not "A. B. is a sovereign" but "A. B. is recognized by His Majesty as a sovereign" '. If that rule were generally followed, the answers of the Secretary of State would be logically irreproachable. That the sovereign recognizes another person as a sovereign is a fact, and the Secretary of State would be reporting that fact. On the basis of such a report the court should have no difficulty in granting consequent immunity from its jurisdiction.[4] Unfortunately for logic, the answers of the Secretary of State depart from the rule as often as they follow it. Even in the cases of Kelantan and Johore, two states which the courts of many a foreign country might well be reluctant to hold sovereign and independent,[5] the Colonial Secretary has written[6]

[1] It has to be borne in mind that to some states recognized as such by the British Government —Kelantan and Johore, for example—there is, strictly, no diplomatic channel; but doubtless the Colonial Office and the High Commissioner will be found to act as a substitute channel.

[2] Cf. Kuhn in *American Journal of International Law*, 39 (1945), at p. 775.

[3] [1928] A.C. at p. 446.

[4] It has also been seen how in the cases arising out of the Spanish Civil War—*The Arantzazu Mendi* and the rest (see *supra*, pp. 234–5)—the courts have held steadfastly to those parts of the certificates of the Foreign Office which contained the words 'recognized' or 'not recognized'.

[5] And whose relations with Great Britain are in any event not governed by international law. Cf. Chen, op. cit., p. 42. See also Jaffe, op. cit., p. 209, who says: 'On the documents there was not the usual relation between nations'.

[6] [1924] A.C. at p. 806 and [1894] 1 Q.B. at p. 153. (Cf. Payot, op. cit., p. 63: 'Le "langage diplomatique" n'est pas toujours celui des juristes. Un Sultan peut paraître indépendant au gouvernement, tout en ne l'étant pas réellement.') But in the *Abubakar* case (1949) he wrote

that they were independent states and their rulers sovereigns. But the English courts, starting from the prime assumption that they are bound by the certificate, do not find in its artificiality any obstacle to their holding that these states are entitled to sovereign immunity. The courts are undeterred not only by the divergence between historical fact and certified fact; they are also prepared, when the Executive does venture to decide on the legal implications of international facts, to turn a blind eye to international law in order to maintain unison with what the Crown conceives to be the legal position. Thus, in the *Bottrill* case Scott L.J. felt obliged to accept the view of the Foreign Office as to whether Germany was still a state and Great Britain still at war with her, as conclusive in English law, while hinting that in international law the conclusion might have been different.[1] This leads one to speculate what might have happened had the first case after the end of the Second World War in which the position of Germany was at issue, been an action between private litigants neither of whom, nor the court, thought fit to apply to the Foreign Office for a certificate. In such an event it would seem that the decision might well have gone the other way. To this it may be objected that it makes it appear that the development of the law depends to a great extent on chance. Perhaps it does. Lawyers who do not practise in the courts sometimes tend to forget that cases the reports of which form their staple reading are actually disputes and contests between persons, real or artificial, about their rights, about their property. These persons are anxious only to have their disputes settled, and are but little concerned with the question of whether and if so what new law is made in the process. Similarly, the principal if not the sole object of the judge is to determine the action which he is trying by reference to the particular facts as he finds them and the law which he deems applicable to those facts. That is why, if a fact having an international law aspect should require to be established, the decision whether to apply to the Executive for assistance, the form of words in which such application is made, the choice of who—plaintiff, defendant, or judge—makes the application, varies from case to case.[2] Much depends on the extent to which the parties agree on some aspect of the question or whether they remain at arm's length; much depends on the standing of the parties and the

more cautiously and in accord with Lord Phillimore's dictum: 'His Majesty's Government recognises the Sultan of Johore as the ruler of the state. As such he exercises attributes of sovereignty.' (See *supra*, p. 251.)

[1] [1947] 1 K.B. at p. 50: 'Whether international law has a different rule is irrelevant.' Cf. Chen, op. cit., pp. 70–71.

[2] In the *A/S Tallinna* case (*supra*, p. 248), the questions for the Foreign Office were formulated by counsel for the defendants and agreed by counsel for the plaintiff, and forwarded to the Foreign Office by the judge. The questions are not set out in the Report, although the judge complained that the Foreign Office reply, which is set out, did not answer the questions fully (80 Ll. L. Rep. at p. 105).

importance, to each of them, of raising or, as the case may be, contesting, a claim of immunity. And there are other relevant factors. Similarly, diverse factors operate with the Crown, with the additional one of policy, which is a factor which must not weigh with the court. But for the Executive, the task it undertakes in preparing a certificate for the use of the court is one of applying itself to the questions asked of it (sometimes without a full knowledge of the matters involved in the case) while being guided by an appreciation of the political situation, the implications of which may be, indeed usually are, beyond the ken of the parties and the court. It is of the nature of cases involving facts which bear upon international law that the solution often lies beyond the range of evidence in the narrow sense given to that term in our courts[1]—that is to say, oral and affidavit evidence. For that solution the court is entitled, by virtue of the doctrine of judicial notice, to turn to the Executive. In so doing, however, it runs the risk of being deflected from its primary duty of doing justice according to law. That there are practical advantages in the avoidance of differences of opinion between judiciary and Executive on important questions of foreign relations, is self-evident; but so far as the decision of the Executive depends on other than purely legal grounds, the resulting judgment of the court must be limited in its general legal value. It is submitted that the risk of the judgment of the courts being affected in this fashion is less when the certificate of the Executive is temporizing than when it is otherwise. For it is clear that the former kind will better enable the courts to conduct the judicial process in the normal way, receiving proof of ordinary facts by ordinary evidence and being apprised of facts of an international nature by the certificate. The courts are then free to apply rules of law, including rules of international law, to the facts of the case before them; and their decisions will be manifestly independent of political considerations. Their judgments will thus gain in stature as being based on juridical principles which are lasting, and not on political expediency, which is transient and fluctuating.

[1] Cf. Jaffe, op. cit., p. 232.

JURISDICTION IN SEIZURES EFFECTED IN VIOLATION OF INTERNATIONAL LAW

By FELICE MORGENSTERN, M.A.

CUSTOMARY international law is now in most countries directly applicable to individuals by virtue of its general 'adoption' or 'incorporation' as part of the law of the land. Treaties in many countries still require a process of transformation. But the inconsiderable number of cases in which courts have failed to apply treaty provisions owing to the absence of enabling legislation gives some indication of the care which states have taken to make treaties enforceable in municipal courts.[1] It would seem to follow that municipal courts would decline to exercise jurisdiction over persons and things brought before them in violation of international law. For in exercising jurisdiction in such circumstances the court fails to give effect to the rule of international law prohibiting the seizure; it not only condones but gives effect to the violation of international law. It is, however, remarkable that in this particular sphere courts have often failed to draw the logical inference from their right and their duty to give effect to rules of international law.

The assumption of jurisdiction over persons and things seized in violation of international law has been ascribed to the obligation, imposed upon most municipal courts, to apply their national law even if it is in conflict with international law. There are undoubtedly cases in which municipal courts have convicted or condemned persons or things[2] which have been brought within their territorial jurisdiction in violation of international law because the courts have been expressly required by national legislation to do so. Thus in the case of *Molvan* v. *Attorney General for Palestine*,[3] where a vessel seized on the high seas was condemned for having brought illegal immigrants to Palestine, the Court was bound by the Palestine Immigration Ordinance of 1941 which called for the condemnation of any delinquent vessel found within the jurisdiction 'whether it came there voluntarily or not'. As a general rule, however, the competence of courts is defined in much looser terms and there is accordingly no fundamental obstacle to a holding that they cannot take cognizance of charges concerning persons or things which, but for an unlawful act, would not be within their territorial jurisdiction.

[1] See, for a discussion of this question, this *Year Book*, 27 (1950), pp. 42 ff.

[2] The only question of jurisdiction which is at issue in this connexion is that of jurisdiction over the person or thing charged, i.e. jurisdiction *ratione personae*. We are not concerned with the question of jurisdiction *ratione materiae*, i.e. jurisdiction over acts such as offences committed on the high seas or on foreign territory, concerning which the state of the forum may by international law not be competent to legislate. It will be assumed throughout this article that the state of the forum possesses the authority to qualify the act charged as an offence.

[3] [1948] A.C. 35; *Annual Digest*, 1948, Case No. 37. This case will be considered in greater detail below.

Attention may be drawn in this connexion to the fact that municipal courts as a rule endeavour to interpret their national law in such a manner as to avoid conflict with international law.[1]

Neither can the failure of courts, in this connexion, to give effect to rules of international law be explained by reference to the doctrine of act of state as applied in the leading case of *Buron* v. *Denman*.[2] Although the original act in violation of international law may be similar both in cases such as *Buron* v. *Denman* and in cases of the kind here under discussion, the question whether the jurisdiction of courts can be founded on such a violation is essentially different from the question raised by cases such as *Buron* v. *Denman*. In the latter the issue is the ability of municipal courts to give redress for the original violation of international law in an action by the injured individual. In the former the issue is whether the violation of international law shall be the source of further rights on the part of the delinquent state, namely, the right to try and the right to punish for offences against its national law[3] individuals who but for that violation would not be subject to its jurisdiction. The inability of municipal courts to give redress in circumstances exemplified by the case of *Buron* v. *Denman* may be deplored by some. However, such inability can be adequately explained by reference to the generally privileged position of governments and their agents in the matter of being sued. No such considerations apply in the case here under discussion. In declining jurisdiction which results directly from the original violation of international law, courts would merely uphold the fundamental maxim *ex injuria jus non oritur*.[4]

The problem arises, in the main, in three types of cases. There are, in the first instance, cases of seizure of individuals in the territory of another state, in violation of the territorial sovereignty of that state or in violation of a treaty of extradition. The second type of case concerns the seizure of

[1] See this *Year Book*, 27 (1950), at pp. 82–86.

[2] In that case, a British naval officer had released British subjects detained as slaves on foreign territory in Africa, and in so doing had set fire to a vessel belonging to a Spanish national who was trading in slaves at the place in question. The Spaniard brought an action in the English courts against the officer. The Crown having adopted the act of the officer, it was held that an action would not lie.

[3] Similar principles would apply if the delinquent state wished to bring a civil action in its courts against a person wrongfully brought within their jurisdiction. However, the cases here discussed relate exclusively to criminal prosecutions, and to proceedings in prize, which are in some ways analogous to criminal proceedings although they are not based on offences in the strict sense.

[4] The Draft Convention on Extradition drawn up by the Harvard Research in 1935 states, in Article 16: 'In exercising jurisdiction under this Convention, no State shall prosecute or punish any person who has been brought within its territory or a place subject to its authority by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures.' While admitting that such an article is partly in the nature of legislation, its framers stressed that it 'assures' a highly desirable sanction for international law in the matter of the recovery of fugitives from justice.

vessels in the territorial waters of another state, an act which, again, is a violation of the territorial sovereignty of that state, and in time of war possibly a violation of its neutrality. This class of cases consists to a large extent of prize cases which may be distinguished from the others by reference to the fact that condemnation is not sought on the basis of an offence in the strict sense of the word and, secondly, that they are tried by courts whose position in many respects is peculiar. The third type of case concerns the seizure of vessels on the high seas in circumstances where such a seizure is not permitted by customary international law or treaty. All these cases have one element in common, namely, the fact that the court is called upon to sit in judgment upon persons or things which were brought before it in violation of international law.

I

The unlawful seizure of fugitives

The largest number of instances falls into the first category, namely, the seizure of individuals who have fled to the territory of another state, in violation of the territorial sovereignty of that state.

There have been cases in which courts have refused to exercise jurisdiction over persons seized on foreign territory in violation of international law. Thus in the case of *Jolis*,[1] a French court of first instance held, with regard to the arrest of a fugitive from justice by French officials on foreign territory:

> 'The arrest . . . could have no legal effect whatsoever, and was completely null and void. This nullity being of a public nature, the court must take judicial notice thereof. The information leading to the proceedings of arrest . . ., the proceedings themselves, the commitment to prison on the same date, the remand order and all that followed thereon must accordingly be annulled.'

It will be submitted that that is the only attitude consonant both with the requirements of international law and with the principles of the municipal law of most states regarding the enforcement of international law in municipal courts.

This is the attitude which has also been adopted by municipal courts in an analogous case, namely, when they have applied the principle of the identity of extradition and prosecution, usually considered to be a principle of customary international law and included in many extradition treaties, and the rule, derived from it, that an individual must be given an opportunity to return to the place of refuge before he can be tried for an offence other than the one for which he was extradited. In strong contrast to their attitude in the analogous case of erroneous extradition which will be discussed below, courts have here honoured the international obligations of

[1] *Sirey* (1934), vol. ii, p. 105.

their countries and have not taken advantage of the fact that the accused is within the jurisdiction.[1] In the leading case of *United States* v. *Rauscher*[2] the Supreme Court of the United States applied the principle of speciality, contained in an extradition treaty, on the ground that the treaty was 'the supreme law of the land, which the courts are bound to take judicial notice of and to enforce in any appropriate proceeding the rights of persons growing out of that treaty'. Similarly, in *Dominguez* v. *The State*[3] the Texan Court of Criminal Appeal stressed that the extradition treaty which fell to be applied 'is part of the law of the land, binding upon courts and available to persons having rights secured or recognised thereby, and may be set up as a defense to a criminal prosecution established in disregard thereof'. A notable decision also in this connexion was that given by the Spanish Supreme Court in 1934 in the case of *Fiscal* v. *Samper*.[4] The Court held as follows:

'The extradition treaty between Spain and Portugal . . . must be considered . . . as a constituent part of Spanish legislation and, consequently, of sufficient force to regulate the matter which it covers, not only as to the international relations of the contracting States, but also as to the juridical situation of those extradited from the Portuguese Republic upon a request made by the Spanish courts.... Article 9 of the treaty provides that individuals delivered by virtue of the said convention may not be tried for any previous crime different from that which was the basis of extradition. [In the case under review] the crime considered in the sentence is distinct from that which underlay the extradition. . . . Accordingly, the appellant cannot be condemned. . . .'

However, courts have not always adopted the same attitude with regard to persons who have been brought from their place of asylum by force or fraud, without regular extradition proceedings. Thus in *State* v. *Brewster*[5] the Supreme Court of Vermont held, with reference to an accused who had been seized in Canada, apparently—though not certainly—with official approval:

'The illegality, if any, consists in a violation of the sovereignty of an independent nation. If that nation complains it is a matter which concerns the political relations of the two countries, and in that aspect is a subject not within the constitutional powers of this court.'

In *United States* v. *Unverzagt*[6] a federal district Court held, in a case where a United States citizen was abducted from British Columbia by United States officials:

'No asylum is guaranteed the defendant in Canada, and if a treaty did cover the

[1] See, in addition to the cases discussed below, *In re Millet*, *Annual Digest*, 1938–40, Case No. 148, and *In re Deltil*, *Sirey* (1887), vol. i, p. 188, for examples of French practice; *Extradition* (*Germany and Czechoslovakia*) *Case*, *Annual Digest*, 1919–22, Case No. 182, *In re Wolny*, ibid., 1935–7, Case No. 174, R.G. Str. 41, 272 and R.G. Str. 45, 271, for examples of German practice; *Vallerini* v. *Grandi*, *Annual Digest*, 1935–7, Case No. 176, for Italian practice.

[2] 119 U.S. 407. [3] Dickinson, *Cases on the Law of Nations* (1929), p. 755.

[4] *Annual Digest*, 1938–40, Case No. 152.

[5] 7 Vt. 118. [6] *Annual Digest*, 1919–42 (Supplementary Volume), Case No. 53.

offence charged it would be political and not judicial, and before the matter could be presented to the court the Congress must make it a rule for the court. The treaty between the United States and Great Britain is a compact depending upon honor between the Governments. Any infractions are subject to international negotiation, so far as the party chooses to seek redress. It must be obvious that with this the courts have nothing to do.'

Such language, coming as it does from the courts of a country where treaties are the supreme law of the land, requires explanation.

It is probable that in these cases courts have been misled by the sweeping terms of decisions in cases where the seizure of a fugitive, though irregular, was not in violation of international law. For not all the instances in which courts have adopted such an attitude are relevant here. A considerable number of them are cases in which individuals have been kidnapped in other countries by private persons and brought within the jurisdiction without the connivance of state authorities. Such a seizure, although a violation of foreign law for which the person responsible may be prosecuted in the state where the seizure took place and for which his extradition may be requested by that state,[1] is not, strictly speaking, a violation of international law. Consequently, while municipal courts will not allow the person responsible for the unlawful act to bring a civil action against the individual seized and so to reap the benefit of the illegality, they are not debarred from exercising jurisdiction in a prosecution instituted by the state once the fugitive is within the territorial limits. This was emphasized by the Supreme Court of Iowa in the case of *State* v. *Ross*:[2]

'The officers of the law take the requisite process, find the persons charged within the jurisdiction, and this . . . without force, wrong, fraud, or violence on the part of any agent of the State or officer thereof. And it can make no difference whether the illegal arrest was made in another State or another Government.'

Many of the early American cases cited in connexion with the question of jurisdiction after seizure in violation of international law fall into this category.[3] In particular, in the leading case of *Ker* v. *Illinois*,[4] the accused was convicted by an Illinois court after seizure on foreign territory, admittedly by a state official but 'without any pretence of authority from the government of the United States', and the case was decided on that footing.[5]

[1] Extradition was so granted by a United States court in *Villareal* v. *Hammond* (1934), *Annual Digest*, 1933–4, Case No. 143, and in *Vaccaro* v. *Collier* (1930), ibid., 1929–30, Case No. 180. The injured individual would also, presumably, be able to bring an action for false imprisonment.

[2] 21 Iowa 467. In this case the person charged had been brought from another state of the United States, but the principle enunciated is of general applicability.

[3] See, e.g., *Mahon* v. *Justice*, 127 U.S. 700; *State* v. *Smith*, 1 Bailey 283.

[4] 119 U.S. 436. The decision of the Supreme Court in this case is, in any event, no authority on the subject here under discussion, for the Court held that on that point it was not competent to review the decision of the State Court of Illinois.

[5] The view is expressed in Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), p. 328, that a state bears an *unrestricted* responsibility for internationally injurious acts committed

That precedent has been relied on in many later decisions where the original seizure was in violation of international law. It is thus probable that courts have been misled by the wide and general phraseology of some of these cases.[1]

Similarly, the numerous cases in which individuals have been surrendered by agents of the state of refuge without resort to extradition proceedings are not directly relevant here. The state which receives the fugitive for prosecution has not exercised any force on the territory of the state of refuge and has in no way violated its territorial sovereignty. There is thus no violation of international law. It is significant that while it is recognized that in the case of seizure in violation of international law there is a duty to return the individual concerned to the place where he was seized,[2] there is no such duty after irregular surrender by agents of the state of refuge.[3] At the same time courts have in cases of this kind again used phraseology of general applicability which is both misleading and indicative of the lack of awareness on the part of these tribunals that there are circumstances in which the illegality of the seizure vitiates the jurisdiction of the court. A few examples will demonstrate that attitude. In the case of *United States* v. *Insull*[4] the fugitive had been seized by Turkish police on a Greek vessel in Turkish waters, and thus within Turkish jurisdiction, and had then been surrendered to an agent of the United States. The facts strongly suggest that no violation of international law was committed. Yet the Court was content to proceed on the assumption that there might have been a violation of international law, and held that 'it is plain that one charged with crime cannot escape prosecution under the indictment by showing some irregularity, or even an unlawful kidnapping, by officers of the government

in the exercise of official functions without the authority of the state. But the learned author also states that such acts are not, in themselves, international delinquencies. It is the latter aspect which is relevant in municipal courts. There may be an international duty to return the fugitive.

[1] See also *Ex parte Lopez*, *Annual Digest*, 1933–4, Case No. 76. In that case the original seizure on Mexican territory was, apparently, made by four private persons. But the phraseology used by the Court was of general application. In particular, the Court held, with regard to the claim of Mexico for the return of the fugitive, that such claims were not within its jurisdiction. And see a French case reported in *Revue de droit international privé et de droit pénal international*, 6 (1910), p. 277.

[2] See *Harvard Research, Extradition* (1935), p. 628, and authorities there cited.

[3] See *Reports of the Law Officers of the Crown* (1882), pp. 75–76. And see, in particular, the decision of the Permanent Court of Arbitration in the case of *France* v. *Great Britain*, concerning one Savarkar. In that case a French police officer had surrendered to the authorities of a British vessel an Indian prisoner who had escaped from it in the port of Marseilles. France claimed his return. It was held: 'While admitting that an irregularity was committed by the arrest of Savarkar, and by his being handed over to the British police, there is no rule of international law imposing in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power' (Scott, *The Hague Court Reports* (1916) p. 276).

[4] *Annual Digest*, 1933–4, Case No. 75. See also *Ex parte Campbell*, 1 F. Supp. 899, a very similar case, in which a fugitive was returned by Mexican agents to United States agents without regular process.

which results in placing him within the jurisdiction of the court where the indictment against him is pending'. Similarly, in the case of *Katz* v. *Officer Commanding the Polish Military Prison, Jerusalem*[1] the fugitive had been handed over by the British authorities in Palestine to the Polish armed forces without the regular proceedings required by the Allied Forces Act which, for present purposes, are analogous to extradition. The case came before the Supreme Court of Palestine on an application for *habeas corpus*, and that Court held, again in terms of great generality, that 'provided the Court Martial is properly constituted, and provided that the accused who is before it is subject to its jurisdiction, the circumstances in which he was arrested and arrived before the Court are not relevant to the question of the jurisdiction of the Court'.[2]

In the type of case which has just been discussed municipal courts, in accordance with a principle generally followed by them,[3] have been reluctant to inquire into the legality of the acts of agents of a foreign state. The same consideration applies in cases in which the state of refuge authorizes the surrender of a fugitive in circumstances not in conformity with a treaty of extradition. In such cases, however, there is again no violation of international law. Thus where extradition is granted for an offence not covered by an extradition treaty, the state of refuge is by international law free to grant surrender. Similarly, it seems doubtful whether international law, as opposed to municipal law, requires the state of refuge to grant extradition only after regular judicial or administrative proceedings.[4] In this connexion it is generally true to say that individuals have no rights under extradition treaties.[5]

[1] *Annual Digest*, 1943–5, Case No. 45.

[2] See also the decision of the Hungarian Minister of Justice of 26 January 1928 in *Re Károly R.*, where a fugitive had been surrendered by Egyptian police prior to the completion of extradition proceedings (*Annual Digest*, 1927–8, Case No. 236). And see the decision of the German Reichsgericht of 24 March 1922 in the *Delivery without Extradition* (*Germany*) *Case* (*Annual Digest*, 1919–22, Case No. 185).

[3] See, for an important recent instance, *Bernstein* v. *Van Heyghen Frères*, decided by a United States Circuit Court of Appeals in 1946, 163 F. 2d 246.

[4] It is with regard to this question in particular that courts of the requiring state have held that they cannot inquire into the legality of the acts of the surrendering state. See, e.g., *Yousef Said Abu Dourrah* v. *The Att. Gen.*, decided by the Supreme Court of Palestine on 20 January 1941, *Annual Digest*, 1941–2, Case No. 101. The decision of the Court of Appeal of Bordeaux in the case of *Jabouille* (*Revue de droit international privé et de droit pénal international*, 2 (1905), p. 704), that in a case of surrender by expulsion to the frontier the individual must be allowed to leave the country to which he was so surrendered, would seem to have erred on the side of leniency. The French Court of Cassation in 1908, in the case of *Lepontois*, assumed jurisdiction in analogous circumstances (cited by Travers, ibid., 13 (1917), at p. 636). See also the case of *Hammerstein, Clunet* 23 (1896), p. 562; and the case of *Bolle*, ibid. 33 (1906), p. 1098.

[5] See, e.g., *Extradition* (*Germany and Italy*) *Case*, *Annual Digest*, 1929–30, Case No. 167; *Extradition* (*Jurisdiction*) *Case*, ibid., 1935–7, Case No. 165; *In re Manovrati*, ibid., Case No. 175; *Chandler* v. *United States* (1948), 171 F. 2d 921. The only possible exception is provided by the principle of non-extradition of political offenders. It may be that that principle has become a rule of international law. Extradition of a political offender would then be a violation of international

But the principle that municipal courts cannot review the acts of a foreign government has been invoked,[1] less legitimately, in cases where the state of refuge has granted extradition on mistaken assumptions, as, for instance, where extradition is granted for a common crime but the charge against the fugitive is of a political nature. In such cases the arrest of the fugitive by the requiring state for the purpose of trial on the political charge is a violation by that state of the treaty of extradition which defines the limits within which the state of refuge has waived its right to grant asylum. There is no question of an offensive inquiry into the legality of the acts of the state of refuge, for the latter has acted in good faith. Nor is the argument that individuals have no rights under extradition treaties relevant in this connexion.[2] The issue is not the necessity of establishing the existence of international obligations, but the recognition of the enforceability of existing obligations in municipal courts at the instance of private parties. Occasionally courts have been unable to give effect to these obligations because they had not undergone a process of transformation as required by the law of the state. This point is illustrated by the decision of the Italian Court of Cassation in the case of *Oberbichler*.[3] In that case the fugitive had been extradited to Italy on the condition that the death penalty should not be imposed. The Court was prepared to assume that Italy had undertaken an international obligation in this respect. It nevertheless held that it could not give effect to that condition on the ground that 'no limitation upon the application of the rule of law, even if derived from international relationships, can be taken into consideration by the judge unless it has been transmuted into a rule of municipal law'. But courts have in cases of this nature failed to give effect to international obligations also where these have indubitably been part of the law of the land. Their attitude is exemplified by the decision of the Supreme Court of Palestine in the case of *Yousef Said Abu Dourrah* v. *The Attorney General*.[4] The appellant in that case had been extradited from Transjordan to answer a charge of murder. It was contended on his behalf that the charge was of a political nature, while extradition had been granted for a common crime only. The Court declined to consider that contention on the ground that 'even supposing it were a political murder, nothing prevents the man, if he is within the jurisdiction of this country, from being tried for it'.

law on which the fugitive should be able to rely before the courts of the prosecuting state. See Lauterpacht in this *Year Book*, 21 (1944), p. 88; and see ibid. 26 (1949), pp. 342–4.

[1] See, e.g., *In re Becker and Hauschke*, *Annual Digest*, 1931–2, Case No. 164, for a decision of the German Reichsgericht on these lines. See also R.G. Str. 60, 202.

[2] For a case in which it was invoked in this connexion see *Spanish-German Extradition Treaty Case*, *Annual Digest*, 1925–6, Case No. 234.

[3] Ibid., 1933–4, Case No. 150.

[4] Ibid., 1941–2, Case No. 101. The Court was not convinced that the charge on which the extradited person was being tried was political. See also *In re Becker and Hauschke*, ibid., 1931–2, Case No. 164; *Spanish-German Extradition Treaty Case*, ibid., 1925–6, Case No. 234.

Finally, there is a residue of cases in which there has been a seizure of a fugitive by authorized officials of the pursuing state on the territory of the state of refuge in clear violation of one of the most fundamental rules of customary international law. The fact that some courts have in this connexion also refused to consider the manner in which an accused individual was brought before them has sometimes been due to an imperfect appreciation of the implications of the exercise of jurisdiction after an illegal seizure. In the early English case *Ex parte Susannah Scott*[1] the accused had been arrested in Brussels by a British police officer. The alleged illegality of the seizure was raised at the trial. Lord Tenterden held that the Court could not inquire into the circumstances of the arrest. It is significant, however, that the learned Judge seems to have thought only in terms of a violation of Belgian law, not of international law.[2] Moreover, at times there has clearly been reliance on earlier decisions in which the seizure was not a violation of international law. That, at any rate, was the partial explanation of the decision of the Supreme Court of Palestine in the case of *Afouneh* v. *Attorney General of Palestine*.[3] The appellant in that case had been arrested on Syrian territory by an officer of the Palestine police. He contended that he had thus been brought before the Court of Criminal Assize at Jerusalem, the trial court, in violation of international law. The Supreme Court relied without qualification on *Ker* v. *Illinois* which, it has been shown above, related to circumstances in which the original seizure was not a violation of international law. On the authority of that precedent it held that the appellant could not set up the unlawful manner in which he was brought within the jurisdiction in answer to the indictment. In the view of the Court 'it belongs exclusively to the government from whose territory he was wrongfully taken to complain of the violation of its rights'.[4]

If, then, municipal courts have occasionally failed in this sphere to affirm their readiness to enforce international law, they have done so for reasons unconnected with the merits of the subject under discussion. Their

[1] (1829), 9 B. & C. 446.

[2] It is possible—though the report of the case throws no light on the question—that Belgium agreed to the arrest and that there was thus no violation of international law. See the interpretation of the case by the Supreme Court of Palestine in *Afouneh* v. *Attorney General of Palestine* (1942), *Annual Digest*, 1941–2, Case No. 97.

[3] *Supra.*

[4] The unlawful seizure took place on Syrian territory at a time when that country was under British occupation. An irregular apprehension by British forces was thus facilitated but not justified, because Syria did not lose her independence and extradition did not fall within the powers of the occupation authorities. On the other hand, the decision of a United States Circuit Court of Appeals in the case of *Chandler* v. *United States* (1948), 171 F. 2d 921, to the effect that there was jurisdiction to try a person who had been arrested in Germany by American military forces of occupation may be justified by reference to the fact that at the time Germany's independent existence was in suspense. The same is probably true of the decision of the Belgian Court of Cassation of 4 July 1949 in *Auditeur Général près la Cour Militaire* v. *Müller* (*Pasicrisie Belge*, 1949, i, 506). But the Court held, in sweeping terms, that the fact that the appellants, German nationals charged with war crimes, were irregularly arrested by the Belgian authorities did not affect the competence of the military trial court or the admissibility of the prosecution.

decisions thus cannot be said to affect the principle, affirmed in the cases cited at the beginning of this section, that an arrest in violation of international law can have no legal effect.

II

Seizure of vessels in foreign territorial waters

The issues presented by the seizure of vessels in foreign territorial waters are essentially the same as those arising from the seizure of individuals in foreign territory. This, too, is a case of violation both of the sovereignty of the foreign state and of the rule of international law which prohibits the exercise of acts of authority within the territorial jurisdiction of other states. It would seem, therefore, that municipal courts ought to decline to give effect to such a seizure and thereby enforce the rule of international law prohibiting it.

Such a policy is, on the whole, followed by continental prize courts. In France it was established by early decisions that vessels seized in the territorial waters of neutral states cannot be subjected to proceedings in prize, and that the intervention of the neutral state is not necessary to obtain their release.[1] In modern cases the right of private owners to make a claim of territory seems to have been undisputed, although it has not been successful.[2] In Germany, similarly, vessels seized in violation of international law are released on the claim of their owners.[3] Moreover, it would appear that German prize courts in the two world wars shifted the burden of proof in this matter from claimant to captor. A seizure was declared valid unless it was proved to have taken place within the territorial limits of a neutral state; in case of doubt the vessel was released. In the case of the *Ambiorix*[4] the German Supreme Prize Court gave expression to the following significant views:

'A captured vessel can only be condemned if it is established to the satisfaction of the Court that the capture took place outside neutral territorial waters. If it took place within the limits of the sovereignty of a neutral State, the act of capture is null and void, and the seizing State can derive no rights therefrom. The question whether in a given case these restrictions on the right of capture have been observed must, accordingly, be examined by the Court *ex officio*, and if it cannot be answered in the affirmative, the seizure cannot be upheld.'

That decision shows the problem of the 'claim of territory' in its true light.

[1] See *The Christiana* (1799), Pistoye and Duverdy, *Traité des prises maritimes* (1855), vol. i, p. 99; *Le Saint Michel* (1792), ibid., p. 123; *Le Frei* (1871), Barboux, *Jurisprudence du Conseil des Prises* (1872), p. 66.

[2] See, e.g., *The Heina* (1915), Fauchille, *Jurisprudence française en matière de prises maritimes* (1916), vol. i, p. 119; *The Tinos*, ibid., p. 309.

[3] See, e.g., *The Ambiorix*, Fauchille and de Visscher, *Jurisprudence allemande en matière de prises maritimes* (1924), p. 131. See also Article 3 of the 'Prisenordnung', cited in Verzijl, *Droit des Prises* (1924), p. 276.

[4] *Supra.*

Unless capture is shown to have taken place in circumstances authorized by international law, the court lacks jurisdiction to deal with the merits of the case.

Again, however, this has not invariably been the attitude of courts. In an early American case, *The Ship Richmond*,[1] no less an authority than Chief Justice Marshall supported the view that while the seizure of an American vessel by American officials within the territorial jurisdiction of a foreign power was an offence against that power, municipal courts could take no cognizance of it, and that 'the law does not connect the trespass with the subsequent seizure by the civil authorities'. In *The Merino*[2] this was regarded as settled law. English prize courts have admitted that the seizure of enemy vessels in the territorial waters of a neutral state is a violation of international law, and have held that the neutral state can claim the release of vessels so seized in court, and not only by way of international negotiation.[3] Lord Stowell affirmed this rule in language which is significant in the present context:[4]

'The sanctity of a claim of territory is undoubtedly very high. When the fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy.'

But the courts have also held that the individual claimant, as opposed to the neutral state, cannot assert the illegality of the capture.[5] The attitude of the courts of the United States has been similar.[6]

It is not easy to understand why in cases where evidence is brought by the individual claimant regarding seizure in neutral territorial waters, and 'the fact is established', it does not 'overrule every other consideration'. The reason for the distinction which is given in the decisions is that a 'capture within the territorial waters of a neutral is, as between belligerents, for all purposes rightful . . .'.[7] It is certainly a principle applied by English courts that the property of the enemy may be seized wherever found. This principle, however, can only mean that if enemy property, whether public or private, is found in any place where, by international law, there is authority to seize, it is liable to be appropriated. The suggestion that a seizure in violation of international law is 'rightful' as between belligerents establishes an untenable limitation on the operation of international law. A seizure in neutral territorial waters is a violation of customary inter-

[1] (1815) 9 Cranch 102. The vessel was seized in Spanish territorial waters and charged with a violation of the United States Non-intercourse Act. [2] (1824) 9 Wh. 391.

[3] See, e.g., *The Twee Gebroeders* (1800), 3 C. Rob. 162; *The Anna* (1805), 5 C. Rob. 373; *The Purissima Conception* (1805), 6 C. Rob. 45; *The Valeria*, [1921] 1 A.C. 477; *The Pellworm*, [1922] 1 A.C. 292. [4] *The Vrow Anna Catherina* (1803), 5 C. Rob. 15.

[5] See, e.g., *The Purissima Conception* (1805), 6 C. Rob. 45; *The Bangor*, [1916] P. 131; *The Dusseldorf*, [1920] A.C. 1034.

[6] See, e.g., *The Anne* (1818), 3 Wheaton 435; *The Lilla* (1862), 2 Sprague 177; *The Sir William Peel* (1866), 5 Wall. 517; *The Adela* (1867), 6 Wall. 266. [7] *The Bangor*, *supra*.

national law. Customary international law is, without doubt, part of English law and, in particular, falls to be applied by prize courts.[1] A violation of that law cannot give rise to legal consequences in relation to any party.

The second factor which probably had considerable influence on the attitude of courts in this matter[2] is the circumstance that before 1914 enemy aliens were not entitled to appear in court and were thus unable to assert claims on their own behalf. That principle was, however, modified during the First World War. In *The Möwe*[3] Sir Samuel Evans held that enemy aliens must be permitted to appear in court in cases where they were able to rely on a treaty, such as the Hague Convention of 1907, binding upon their country and upon Great Britain. The Privy Council approved that rule in *The Vesta*.[4] An enemy alien is still only allowed to enter an appearance in cases in which he is able to invoke a treaty. But we may note, in the present context, that Hague Convention XIII of 1907 prohibits capture in neutral territorial waters in absolute and general[5] terms. That Convention was not ratified by Great Britain, but both in *The Bangor* and in *The Valeria* the courts were prepared to assume that it was binding upon them.[6] It has, indeed, been argued that the Convention establishes rights and duties as between sovereign only.[7] But such an argument is once more based on the fallacy that international law cannot be applied in municipal courts—and, in particular, in prize courts—at the instance of private parties.[8] It is in conflict with the view expressed in *The Möwe* and the practice generally followed by prize courts which applied the Hague Conventions in two world wars.[9] The failure of prize courts to give effect to a claim of territory made by a private individual can, at the present day, have no justification. A policy of recognizing the invalidity of a capture made in violation of international law without regard to the

[1] See, e.g., *The Zamora*, [1916] 2 A.C. 77, 91; *The Odessa*, [1915] P. 52, 61.

[2] It did not apply in the American case of *The Anne*, *supra*.

[3] [1915] P. 1.

[4] [1921] 1 A.C. 774, 786. No court of the United States was in a position to decide the matter in the two world wars, but it is difficult to imagine that the United States, which previously followed British doctrine, would now maintain that ancient doctrine in all its rigidity.

[5] Article 3 of that Convention provides, as was pointed out in *The Bangor*, *supra*, that 'if the prize is not within the jurisdiction of the neutral power, the captor government, *on the demand of that power*, must liberate the prize with its officers and crew'. It seems doubtful whether that provision implies, *ex contrario*, that the captor government is not bound to liberate the prize on the demand of the owner. Article 2 of the Convention provides, in very general terms, that capture in neutral territorial waters is 'strictly forbidden'. It would seem to be inconsistent with legal principle to admit that a violation of so strict a prohibition can be valid in relation to any party. See also *The Heina*, *supra*.

[6] The United States adhered to the Convention in 1910.

[7] Colombos, *The Law of Prize* (3rd ed. 1949), p. 125.

[8] Admittedly treaties affecting private rights require enabling legislation before they can be applied in English courts. But it is usually held that treaties affecting the belligerent rights of the Crown are part of English law without such a process of transformation.

[9] See, e.g., *The Ophelia*, [1915] p. 129; *The Chile*, [1914] p. 212; *The Blonde*, [1922] 1 A.C. 313; *The Bärenfels* (1925), 1 B. & C.P.C. 122; *The Erymanthos* (1914), ibid. 399.

standing of the party who draws attention to the illegality is alone consonant with the authority of international law.

III

Seizure on the high seas in circumstances not authorized by international law

While states are free to control the activities of their own vessels on the high seas, for these are not there under the jurisdiction of any other state, they cannot, on principle, exercise authority over the vessels of any other nation. International law does, indeed, give states a right to seize foreign vessels on the high seas in certain circumstances. Thus by customary international law a right of seizure of enemy vessels and of certain neutral vessels is granted to a belligerent state. Similarly, to mention but one instance, some powers of jurisdiction on the high seas have been granted to states by treaty for the protection of fisheries. But where the exercise of authority is not so affirmatively permitted, seizure of foreign vessels with the purpose of charging them with an offence against the law of the seizing state is a violation of international law. Once more principle would seem to demand that the courts of the seizing state should, by refusing to exercise jurisdiction over a vessel so seized, deny the captor the right to benefit from his illegal conduct.

This was, apparently, not the attitude of the Judicial Committee of the Privy Council in the case of *Naim Molvan* v. *Attorney General for Palestine*.[1] In that case a vessel had been seized by the British Navy on the high seas off the shore of Palestine, and had been condemned in Palestine for a violation of the Immigration Ordinance of 1941. The Court found that the seizure on the high seas was not, in fact, a violation of international law, for the vessel was sailing without a recognized flag. However, on the question whether, assuming that the seizure was in violation of international law, the terms of the Ordinance applying to vessels within the jurisdiction 'whether . . . the vessel . . . came there voluntarily or not', demanded the forfeiture of the illegally seized vessel, the Court expressed, *obiter*, an affirmative view: 'As a result of the act, right or wrong, the vessel was in fact in a Palestinian port and the terms of the Ordinance demanded its forfeiture.' Similarly, a United States Circuit Court of Appeals held, in the case of *United States* v. *Ford*,[2] that British subjects seized on the high seas could be tried for a violation of the United States Prohibition Laws, on the ground that 'It was sufficient that the defendants were before the Court, and that the jurisdiction was not impaired by the manner in which they were brought before it'. Here, too, the statement was *obiter*, for the Court found that the seizure was authorized by a treaty between the United States and

[1] [1948] A.C. 351.

[2] *Annual Digest*, 1925–6, Case No. 110.

Great Britain. In effect the Court left the substantive decision open for future determination.

A decision of that nature was subsequently given in the United States in two prominent cases. In *United States* v. *Ferris*[1] some British subjects were charged with conspiracy to violate the United States Prohibition Acts after having been seized on a Panamanian vessel 270 miles off the coast of the United States. The Court held that, as they were illegally before it, they could not be subjected to trial:

'As the instant seizure was far outside the limit (laid down by the Treaty of 1924 between the United States and Panama) it is sheer aggression and trespass . . . contrary to the treaty, not to be sanctioned by any Court, and cannot be the basis of any proceedings adverse to defendants.'

That decision received emphatic support from the Supreme Court in *Cook* v. *United States*.[2] In that case a British vessel was seized on the high seas outside the limits of the jurisdictional zone defined by the Treaty of 1924 between Great Britain and the United States, and charged with a violation of the Tariff Act of 1930. The Supreme Court held that it had no jurisdiction over the vessel:

'The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it has imposed a territorial limitation upon its authority. . . . Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty.'

In this connexion, then, courts of the United States have recognized the implications of the exercise of jurisdiction after seizure in violation of international law, and have acted accordingly. But it should be noted that, as yet, they have only considered their jurisdiction to be affected by a seizure in violation of a treaty. The decision in *Cook* v. *United States* was significant in this connexion. In the first instance, the Court held that by the treaty with Great Britain the United States had 'imposed a territorial limitation upon its own authority', whereas the treaty had, in fact, extended the normal territorial limits. The Court thus implied that, but for the treaty, it would consider seizure on the high seas to be lawful. Secondly, the Court distinguished earlier cases, such as *The Richmond*, which have been discussed above, on the ground that they were not cases of the violation of a treaty, but 'merely violations of the law of nations because made within the territory of another sovereign'. The Court may have been influenced by the consideration that under the Constitution of the United States treaties

[1] *Annual Digest*, 1927–8, Case No. 127.

[2] 228 U.S. 102; *Annual Digest*, 1931–2, Case No. 1. The case is also known as *The Mazel Tov*.

are the supreme law of the land, while no such authority is expressly given to customary international law. However, it may be noted that courts of the United States, like English courts, normally enforce the rules of customary international law as 'part of the law of the land'.[1] There is no reason why in cases such as those here under discussion a different practice should operate. Both to customary law and to treaties there must apply the principle that jurisdiction cannot be exercised after seizure in violation of international law.

That principle was affirmed in an early French case, which does not fall directly into the category of cases here discussed but may conveniently be considered in conjunction with them. The case concerned the seizure, in French territorial waters, of a Sardinian vessel which had been driven there by stress of weather. By a rule of customary international law vessels in distress are immune from the jurisdiction of the state in whose waters they seek shelter; they are, as it were, deemed to be still on the high seas. The Court of Appeal of Aix, in a decision of 6 August 1832, held that 'the arrests constituted a violation of the law of nations, that they must, accordingly, be considered null and void, and that the persons arrested must be released and conducted to Sardinian territory'.[2]

Conclusions

The conclusions of this article may be summarized as follows:

1. Principle demands that municipal courts should decline to exercise jurisdiction over persons or property which have been seized in violation of international law. In acting thus the courts would enforce the rule of international law prohibiting the seizure, and give effect to the general jurisprudential maxim *ex injuria jus non oritur*.

2. Courts of many countries have declined to try persons who had sought asylum in foreign states on charges other than those for which they were extradited by the foreign state concerned. They have thus refrained from exercising jurisdiction over persons protected against arrest by a rule of international law. They have not always adopted the same attitude with regard to persons who have been brought from their place of asylum by force or fraud without regular extradition proceedings. However, it would seem that the explanation for this failure to enforce international law may lie in part in the fact that the courts, without giving due consideration to the difference in circumstances, have followed decisions rendered in cases in which the original seizure was not a violation of international law.

[1] See this *Year Book*, 27 (1950), pp. 60 ff.

[2] Cited in *Sirey* (1832), vol. i, p. 578. The decision was reversed by the Court of Cassation, but only on the ingenious ground that the vessel, because of its activities against the safety of the French state, was not entitled to the protection of that rule of international law. See also a decision of a Court of Turin of 1821, cited by Travers in *Revue de droit international privé et de droit pénal international*, 13 (1917), p. 633.

3. Continental prize courts have generally released vessels which have been seized, in violation of international law, in the territorial waters of a neutral state. English courts have done the same where the release of the vessel has been claimed by the neutral state. They have not given effect to the rule of international law where an enemy subject has asserted the illegality of the capture. That limitation on the operation of international law has been based on what is probably a misconception of the nature of belligerent rights.

4. Finally, there has been impressive authority to the effect that the seizure of vessels on the high seas in violation of international law cannot vest in the courts of the seizing state jurisdiction to hear charges of violation of the national criminal law against vessels so seized.

It is occasionally contended that municipal courts cannot enforce the provisions of international law in cases of seizure in violation of its rules on the ground that they lack the competence to send persons or vessels so seized out of the jurisdiction. It is the function of the executive, the argument runs, to send persons and objects out of the country, and the executive alone, therefore, is competent to act in the matter. That argument, it is submitted, is open to question. In the first place, it is doubtful whether it is true that the power of the courts is limited in that way. Some courts have, in fact, issued orders for the return of fugitives to the country of refuge. An example of this is provided by the decision of the Court of Appeal of Aix cited in the previous section. Moreover, in countries where individuals have a right to the protection of the writ of *habeas corpus*, the failure of a prosecution would lead to the release of the person charged and his consequent ability to leave the country.[1] Secondly, the argument that courts lack the power to send persons out of the jurisdiction is probably not relevant to the issue which has been discussed in this article. The return of the person or vessel seized to the place of capture is an act of redress for the original violation required by international law. The issue here discussed is the legal capacity of the delinquent state to derive further benefits from the illegality, namely, the right to subject the person or object seized to its laws. This is one of the matters with respect to which municipal courts are in a position to enforce international law and to affirm its authority. They can do so independently of the question whether, in addition, they order the return of the person or object seized to the place of capture; or whether such action on the part of the executive follows from its inability to subject the person or object seized to the local law; or whether no such action is, in fact, taken until an international claim has been put forward by the state affected.

[1] See also the cases discussed above, in which courts have applied the principle of speciality in extradition, and have held that fugitives must be given the opportunity to return to the country of refuge before being tried on a charge other than that on which extradition was granted.

A more serious objection to the proposition that jurisdiction may not be exercised over persons or vessels seized in violation of international law lies in the fact that frequently prima facie no impropriety seems to attach to their subjection to the local criminal law. It may be argued that while the exercise of jurisdiction in such a case does indeed offend against the principle *ex injuria jus non oritur*, justice is, in effect, done, and that it is undesirable to interfere with this process of justice by reference to considerations of strict legal principle. That argument does not, of course, apply to all the cases discussed in the present article. Thus it can have no relevance to the seizure of prizes in neutral territorial waters. However, even where the courts have before them persons who are guilty of an offence against the local law it is doubtful whether it is desirable that substantive justice should be meted out in disregard of all other considerations. That end may often be served by other means. The principle that rights—including the right of jurisdiction—shall not be acquired as a result of an illegality would seem to embody a requirement of justice of overriding importance. It is submitted that it is the duty of courts to administer the law with an eye not only to the merits of each individual case but also to higher considerations of legality.

That is, in fact, the course adopted by courts in the normal exercise of both civil and criminal jurisdiction. In the sphere of civil jurisdiction we may note the enforcement of the principle, closely analogous to the one which has been under discussion in the present article, that an action will not lie against a person who has been brought within the jurisdiction by the fraud of the plaintiff, irrespective of the hardship which is suffered by the latter as a result of his lack of remedy.[1] In the sphere of criminal law we find the strongest affirmation of the view that considerations of justice arising from an individual set of circumstances must give way to legal principles which are the embodiment of a wider appreciation of the requirements of justice. Courts have not hesitated to quash an indictment or to annul a conviction on the ground of a defect in the procedure even where they have recognized that the defence of the accused as to the substance of the charge was wholly without merit.[2] In *R.* v. *Wilmot*[3] such a course was described

[1] See the English cases of *Stein* v. *Valkenhuysen* (1858), El., Bl., & El., 64; 120 E.R. 431, and *Watkins* v. *North American Land and Timber Co.* (1904), 20 T.L.R. 534. For United States authorities see *Yale Law Journal* 39 (1929–30), pp. 895–8, and *American Journal of International Law*, 28 (1934), p. 235, n. 12.

[2] See, for instance, *R.* v. *Olivo* (1942), 28 Cr. App. Rep. 173, where a conviction was quashed on the ground that three indictments were tried together, although the Court of Criminal Appeal found that the charges could have been included in one indictment, and that there appeared to be no merits on the facts. See, to the same effect, *R.* v. *McDonnell* (1928), 20 Cr. App. Rep. 163. The Court of Criminal Appeal admittedly has the power in such cases to order a re-trial (*Crane* v. *Director of Public Prosecutions*, [1921] 2 A.C. 299).

[3] (1933), 24 Cr. App. Rep. 63, 68. In that case the indictment was held to be bad on the ground of duplicity; one count charged the accused with several offences. See also *R.* v. *Molloy*, [1921]

as being 'a duty on this Court in the interest of justice'.[1] The same principle is illustrated by such fundamental rules as that laying down that every person must be presumed innocent until he is proved guilty—even though a prosecution may fail owing to insufficient evidence in the hands of the police. In no case can the aim of a criminal trial be said to be to obtain a conviction at all costs.

Moreover, there are, in connexion with the problems discussed in the present article, additional considerations of a fundamental nature. As a result of recent developments, in the Charter of the United Nations and otherwise,[2] emphasis has been given to the principle that the individual is the ultimate subject of international law. Attempts are being made to place basic human rights, which are superior to the law of individual states, under the protection and guarantee of the international legal order. That background demonstrates vividly the implications of permitting a state to subject to its jurisdiction an individual protected by a rule of international law against the exercise of that jurisdiction. There is merit in upholding the authority of the international community—and of its law—as the guarantor of the rights of the individual.

2 K.B. 364. In cases of this nature the Court of Criminal Appeal may dismiss the appeal under s. 4, subs. 1, of the Criminal Appeal Act, 1907, on the ground that there has been no substantial miscarriage of justice. However, it will do so only where it can be shown that the accused was not embarrassed or prejudiced by the presentment of the indictment in this form (*R.* v. *Johnson*, [1945] 1 K.B. 419).

[1] See also a passage in the dissenting judgment of Viscount Finlay in *Crane* v. *Director of Public Prosecutions*, *supra*. The learned Judge in that case contended that the Criminal Appeal Act of 1907 did not give the Court of Criminal Appeal the power to order a *venire de novo* in cases where there had been a mis-trial, and so to put a man in peril a second time in a criminal trial. He answered the main objection to this view as follows: 'In the present case it appears that the Act may lead to a grave miscarriage of justice by putting an end to proceedings which have miscarried under a mere blunder at quarter sessions. But it does not fall within the province of any court of law to try to correct an occasional injustice arising from a Statute by putting a strained construction upon its provisions.'

[2] See Lauterpacht, *International Law and Human Rights* (1950).

THE RECOGNITION OF AMERICAN DIVORCES IN ENGLAND

By J. H. C. MORRIS

I. Introductory

According to traditional conflict of laws doctrine, there is a simple answer to the question: 'When will an English court recognize that an American divorce is valid in England?' Divorce, it is said, affects status; therefore, jurisdiction to divorce belongs only to the courts of the parties' domicil; and, since the wife is domiciled where the husband is, all that is necessary is to discover where he was domiciled at the time of the divorce. But conflict of laws doctrine, both in this country and in the United States, is no longer traditional. In England the High Court now has power, in certain circumstances, to divorce a husband who is domiciled abroad at the suit of a wife who is resident in England.[1] In the United States the divorce question is complicated by constitutional considerations and by the fact that a wife can have a domicil different from that of her husband. The simple answer given above, therefore, plainly will not do.

Further reflection suggests that four tentative answers may be given, with varying degrees of confidence:

(1) If the divorce was granted by the courts of the parties' domicil, it will be recognized in England.
(2) If the divorce would be recognized as valid by the law of the parties' domicil, it will be recognized in England.
(3) If the divorce was granted in circumstances in which the English court would have had jurisdiction, it may possibly be recognized in England.[2]
(4) A divorce granted in any other circumstances will not be recognized in England.

It is the purpose of this article to analyse and discuss these four tentative answers.

II. Parties Domiciled in the Divorce Forum

There is ample authority for the proposition that a divorce granted by the courts of the parties' domicil will be recognized in England,[3] even if the

[1] Matrimonial Causes Act, 1950, s. 18; *post*, p. 302.

[2] The suggestion is made by Griswold, 'Divorce Jurisdiction and Recognition of Foreign Divorce Decrees: A Comparative Study', in *Australian Law Journal*, vol. 25, p. 248, at pp. 264–6, reprinted in *Harvard Law Review*, 65 (1951), p. 193, at pp. 226–31.

[3] *Warrender* v. *Warrender* (1835), 2 Cl. & F. 488; *Harvey* v. *Farnie* (1882), 8 App. Cas. 43; *Donaldson* v. *Donaldson*, [1949] P. 363; Dicey, *Conflict of Laws* (6th ed. 1949), Rule 71.

grounds on which it was granted are inadequate by English domestic law.[1] Domicil, here as elsewhere in the conflict of laws, of course means domicil in the English sense;[2] and in England there is no exception to the rule that the domicil of a wife is the same as, and changes with, that of her husband.[3] So far as American divorces are concerned, it is necessary to prove that the husband intended to make his home in a particular state: it is not sufficient to prove that he intended to make his home in 'America' or the United States.[4]

A defendant to an action in England on a foreign judgment *in personam* may plead a number of special defences in addition to the general defence that the foreign court lacked jurisdiction over him. It does not follow, however, that foreign divorces can be challenged on these grounds, for English law regards a divorce decree as more analogous to a judgment *in rem* than to a judgment *in personam*. In the remainder of this section, the question whether these special defences are grounds for attacking a foreign divorce will be discussed. We shall consider (1) public policy, (2) procedural defects, (3) fraud, (4) want of notice, (5) the fact that the foreign court lacked internal competence.

(1) *Public policy*. It is almost inconceivable that an American divorce could be challenged on the ground that its recognition would be contrary to English public policy. In no American state, not even Nevada or Florida,[5] is there anything revolutionary in the grounds for divorce, at any rate on paper.[6] It is the shortness of the residence requirements in some states, rather than any startling liberality in the causes for divorce, which make them attractive to divorce-seekers. English courts could hardly stigmatize a Nevada divorce for 'extreme mental cruelty' as contrary to English public policy, since they themselves are prepared to grant divorces for cruelty in the absence of physical violence.[7] Even a German divorce obtained at the instance of the Gestapo on what were suspected to be racial grounds has been recognized in England.[8]

(2) *Procedural defects*. In *Pemberton* v. *Hughes*[9] a Florida divorce was challenged, by someone not a party to it, on the ground that only nine clear

[1] *Bater* v. *Bater*, [1906] P. 209 (C.A.); *Mezger* v. *Mezger*, [1937] P. 19.

[2] *Re Martin*, [1900] P. 211 (C.A.); *Re Annesley*, [1926] Ch. 692; *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55; *Simons* v. *Simons*, [1939] 1 K.B. 490.

[3] *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146; *A.-G. for Alberta* v. *Cook*, [1926] A.C. 444 (P.C).

[4] *Gatty* v. *A.-G.*, [1951] P. 444, following *Trottier* v. *Rajotte*, [1940] 1 D.L.R. 433 (Supreme Court of Canada).

[5] See below, pp. 290–1.

[6] The grounds which seem most liberal to an English lawyer are habitual drunkenness (Florida); habitual indulgence of a violent and ungovernable temper (Florida); public defamation of one spouse by the other (Louisiana); inability of the spouses to live together (Washington). But in English law cruelty and 'constructive' desertion have proved elastic terms.

[7] E.g. *Usmar* v. *Usmar*, [1949] P. 1 (nagging); *Squire* v. *Squire*, [1949] P. 51 (C.A.) (nagging); *Lauder* v. *Lauder*, [1949] P. 277 (C.A.) (sulking).

[8] *Igra* v. *Igra*, [1951] P. 404.

[9] [1899] 1 Ch. 781 (C.A.).

days had intervened between the day on which process was issued and the day on which it was returnable, instead of ten clear days as required by the rules of the Florida court. It was held that the divorce was entitled to recognition in England. Lindley M.R. was not satisfied that the alleged defect in procedure rendered the divorce invalid in Florida; but, assuming that it did, he disposed of the objection as follows:[1]

'If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the court had jurisdiction in this sense and to this extent, the courts of this country never inquire whether the jurisdiction has been properly or improperly exercised, provided always that no substantial injustice, according to English notions, has been committed.'

This well-considered and carefully guarded dictum has had great influence on the development of English rules as to the recognition of foreign judgments, but its precise scope has not been easy to ascertain. It is clear, however, that a mere defect in procedure is not a ground for challenging a foreign divorce.

(3) *Fraud.* English courts have gone to great lengths in allowing fraud to be pleaded as a defence to an action on a foreign judgment *in personam.* They are prepared to do so even if, in order to prove the fraud, it is necessary to reopen the merits which have already been determined by the foreign court,[2] and even if the defendant could have taken the point in the foreign proceedings.[3] But they have been most reluctant to allow foreign divorces to be challenged on this ground. Indeed, no English case has been found in which such a challenge has succeeded. The fact that the foreign divorce was preceded by an agreement between husband and wife which in England would be regarded as collusive,[4] or that the plaintiff withheld material facts from the foreign court,[5] or that he procured witnesses who gave false testimony,[6] are none of them grounds for refusing recognition in England. Indeed, the gravest doubts have been expressed as to whether a foreign divorce is open to examination at all on the ground of fraud.[7] A distinction has sometimes been drawn between fraud going to the merits,

[1] At pp. 790–1.

[2] *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295 (C.A.); *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310 (C.A.).

[3] *Syal* v. *Heyward,* [1948] 2 K.B. 443 (C.A.).

[4] *Crowe* v. *Crowe* (1937), 157 L.T. 557.

[5] *Bater* v. *Bater,* [1906] P. 209 (C.A.); *Vardy* v. *Smith* (1932), 48 T.L.R. 661, 49 T.L.R. 36 (C.A.).

[6] *Perin* v. *Perin,* [1950] Sc. L.T. 51.

[7] *Vardy* v. *Smith* (1932), 48 T.L.R. 661, 663, *per* Lord Merrivale.

which is not open to examination in England, and fraud going to the jurisdiction of the foreign court, which is.[1] This distinction has little to commend it. If the plaintiff falsely induces the foreign court to believe that it has jurisdiction, the divorce is not invalid in England because of the plaintiff's fraud, but simply because the foreign court lacked jurisdiction.[2]

(4) *Want of notice.* A foreign judgment *in personam* will not be enforced in England if the defendant had insufficient notice of the proceedings to enable him to defend them.[3] It is questionable, however, whether the same applies to a decree of divorce. In three reported cases,[4] the defendant to American divorce proceedings was served by publication in a local American newspaper, and in fact received no notice of the proceedings until after the divorce was granted. It was held that the divorce was not entitled to recognition in this country. But in each case the main ground of the decision was that the husband was not domiciled in the state where the divorce was granted; and the most recent cases clearly hold that want of notice is not a ground on which foreign divorces can be successfully challenged. Thus, in *Boettcher* v. *Boettcher*,[5] an American soldier domiciled in Indiana married an Englishwoman in England. He returned to the United States, leaving his wife in England, and obtained a divorce in Indiana. In accordance with Indiana procedure, notice of the divorce proceedings was advertised in a local newspaper and a copy was sent by the clerk of the court to the wife's correct address in England: but for some reason it never reached her. It was held that the Indiana divorce was valid in England, because 'the requirements of the Indiana court were so similar to certain provisions for constructive service in English practice that they could not be said to be contrary to natural justice'.[6] This decision was followed in *Igra* v. *Igra*,[7] where the English court recognized a German divorce obtained by an Austrian wife against her Polish-Jewish husband in 1942, though the husband was in England and received no notice of the proceedings until the end of the war. In the course of his judgment Pearce J. said:[8]

'It has long been accepted that the court of the domicil is the proper tribunal to

[1] *Bater* v. *Bater*, [1906] P. 209, *per* Sir Gorell Barnes, P., at p. 218; *per* Romer L.J. at p. 236; *per* Cozens-Hardy L.J. at p. 239; *Crowe* v. *Crowe* (1937), 157 L.T. 557, *per* Bucknill J. at p. 558.

[2] E.g. *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55; *Bonaparte* v. *Bonaparte*, [1892] P. 402.

[3] *Buchanan* v. *Rucker* (1808), 9 East 192; cf. Foreign Judgments (Reciprocal Enforcement) Act, 1933, s. 4 (1) (*a*) (iii).

[4] *Shaw* v. *A.-G.* (1870), L.R. 2 P. & M. 156; *Rudd* v. *Rudd*, [1924] P. 72; *Scott* v. *Scott*, [1937] Sc. L.T. 632.

[5] [1949] W.N. 83.

[6] Under rule 9 (5) of the Matrimonial Causes Rules, 1950, replacing s. 42 of the Matrimonial Causes Act, 1857, the English court has a discretion to dispense with service altogether 'in any case in which it may appear necessary or expedient to do so'. It is reluctant to exercise its discretion, but sometimes does so. Compare *Read* v. *Read*, [1942] 2 All E.R. 423, and *Luccioni* v. *Luccioni*, [1943] P. 49 (no dispensation), with *Weighman* v. *Weighman*, [1947] 2 All E.R. 852 (C.A.); *Heath* v. *Heath*, [1950] P. 193 (C.A.); *Paolantonio* v. *Paolantonio* (1950), 66 T.L.R. (pt. 2) 235 (C.A.) (dispensation).

[7] [1951] P. 404.

[8] At p. 412. Compare the remarks of Barnard J. in *Maher* v. *Maher*, [1951] P. 342, 344–5.

dissolve a marriage. Its decisions should, so far as reasonably possible, be acknowledged by other countries in the interests of comity. Different countries have different personal laws, different standards of justice and different practice. The interests of comity are not served if one country is too eager to criticise the standards of another country or too reluctant to recognize decrees that are valid by the law of the domicile.'

On the other hand, in *Bavin* v. *Bavin*[1] the Ontario Court of Appeal declined to recognize a Mexican divorce on the ground that the wife received no notice of the proceedings, the husband having falsely told the Mexican court that he was ignorant of her whereabouts. In this case there was a combination of fraud and want of notice. But fraud, as we have seen, is not a ground on which foreign divorces can be challenged. And if want of notice is such a ground, no distinction can logically be drawn between cases like *Bavin* v. *Bavin*, where the foreign court made no attempt to inform the wife that proceedings were pending, and cases like *Boettcher* v. *Boettcher*, where the foreign court did its best, but failed. It is submitted, therefore, that *Bavin* v. *Bavin* is opposed to the modern current of authority, and should not be followed in England unless it can be explained on a ground suggested in the next paragraph.

At first sight it seems repugnant to English ideas to hold that a person can find himself divorced without his knowledge. On the other hand, such a decision is no more than the logical outcome of the status theory of divorce, according to which any change of status that has taken place in the parties' domicil is entitled to recognition in England. The most recent cases fully recognize that 'the trend of modern decisions has been more and more towards recognizing the finality of the court of the domicil'.[2] Moreover, a divorce decree is analogous to a judgment *in rem*. Since it binds all the world, it can be attacked by all the world to the same extent as by the parties. Therefore, if want of notice is a ground for contesting a foreign divorce, the defect cannot be waived by the party who received no notice;[3] and the right to take the point is not confined to that party.[4] If anyone, even a stranger, can attack a foreign divorce on this ground, the gravest uncertainty in family relationships will result, because the parties may have remarried in reliance on the foreign decree. Again, there are, as we shall see,[5] good grounds for supposing that a foreign divorce granted without personal service on or notice to a defendant wife, though effective to change her

[1] [1937] 3 D.L.R. 328.

[2] *Perin* v. *Perin*, [1950] Sc. L.T. 51, 53, *per* Lord Sorn; cf. *Igra* v. *Igra*, [1951] P. 404, 412, *per* Pearce J., quoted *ante*, pp. 286–7.

[3] In *Rudd* v. *Rudd*, [1924] P. 72, the wife, who had received no notice of her husband's Washington divorce, sought to ascertain her status by petitioning in England for restitution of conjugal rights. She desired that her petition should be dismissed on the ground that the Washington divorce was valid in England. It was not dismissed, though it was undefended.

[4] In *Shaw* v. *A.-G.* (1870), L.R. 2 P. & M. 156, and *Rudd* v. *Rudd*, *supra*, the point seems to have been taken by the court. It was certainly not taken by the divorce defendant.

[5] *Post*, pp. 300–1.

status, does not deprive her of her right to support from her husband. (The decision in *Bavin* v. *Bavin* can be justified on this ground, because the wife claimed and received alimony in Ontario notwithstanding the Mexican divorce.) If this is so, it does much to weaken the argument that a divorce granted without notice to a defendant wife is contrary to natural justice. And so far as her status is concerned, it is surely preferable to face realities and recognize that she is no longer the wife of a man whom in all probability she will never see again.[1]

(5) *Lack of competence in the foreign court.* What is the position if the divorce was granted in the parties' domicil, but the particular court which pronounced the decree had no local competence in matters of divorce? Since divorce can now be had in all the American states, this question can only arise, so far as American divorces are concerned, in the unlikely event of the proceedings being brought in the wrong court within the state, for instance a court of law instead of a court of equity. Although Lindley M.R. in *Pemberton* v. *Hughes*[2] required that the foreign court should possess 'competence to entertain the sort of case which it did deal with', he went on to say:

> 'But the jurisdiction which alone is important in these matters is the competence of the court in an international sense. . . . Its competence or jurisdiction in any other sense is not regarded as material by the courts of this country.'

Yet in *Papadopoulos* v. *Papadopoulos*,[3] a Cyprus nullity decree was denied recognition in England on the ground that the Cyprus court had no power, under the Order in Council which established it, to decree annulment. This case is difficult to reconcile with *Vanquelin* v. *Bouard*[4] and with the reasoning of Lindley M.R. in *Pemberton* v. *Hughes*. But if it was rightly decided, no doubt it furnishes the rule for foreign divorces as well as for foreign nullity decrees, for both equally affect status and are analogous to judgments *in rem*.[5]

A similar question is whether a foreign divorce is open to attack on the ground that the plaintiff failed to comply with the jurisdictional requirements of the foreign law. In *Bater* v. *Bater*,[6] both the President and the Court of Appeal, having found that the husband was domiciled in New York in the English sense, seemed to think it was their duty to satisfy themselves that the wife had complied with the residence requirements of the New York statute. Statements to the same effect are to be found in

[1] In *Bavin* v. *Bavin* the wife's petition for divorce in Ontario was dismissed because the husband was not domiciled in that province. The result seems unfortunate, at any rate for the wife.

[2] [1899] 1 Ch. 781, 790–1 (quoted *ante*, p. 284).

[3] [1930] P. 55.

[4] (1863), 15 C.B. (N.S.) 341 (judgment *in personam*).

[5] *Salvesen* (*or von Lorang*) v. *Administrator of Austrian Property*, [1927] A.C. 641.

[6] [1906] P. 209 (C.A.).

other cases.[1] On the other hand, in *Bater* v. *Bater* all three members of the Court of Appeal referred with approval to the statement of the Privy Council in *Le Mesurier* v. *Le Mesurier*,[2] that 'the domicil for the time being of the married pair affords *the only true test* of jurisdiction to dissolve their marriage'. Moreover, no case has been found in which a foreign divorce has been challenged on this ground; and it is submitted that it would be contrary to principle to allow such a challenge to succeed.

III. Divorce Recognized by the Law of the Domicil

Under the rule in *Armitage* v. *A.-G.*,[3] English courts will recognize a divorce granted in a country where the parties were not domiciled, if it would be recognized as valid in the country where they were domiciled at the time of the divorce. This rule carries to its logical conclusion the status theory of divorce. Its rationale is that if the status of the parties is changed or recognized as having been changed in the country of their domicil, the change of status is entitled to recognition in England. If the parties to an American divorce were not domiciled (in the English sense) in the state where the divorce was granted, it is most likely that they were domiciled in some other American state. The question then arises, when will one American state recognize a divorce granted in another? For an English court this is, of course, a question of foreign law, and hence a question of fact to be proved by expert evidence. But it is a question on which some misapprehension seems to exist. For instance, in a recent case in Scotland,[4] the husband was domiciled in the state of Washington; he obtained a divorce in Idaho; the court held (without requiring any evidence of the law of Washington) that the divorce would be recognized in Scotland under the rule in *Armitage* v. *A.-G.*, because it was 'sufficiently known' that there is reciprocity in this matter, 'at least between certain states of the Union'.

[1] E.g. *Crowe* v. *Crowe* (1937), 157 L.T. 557, *per* Bucknill J.; *Mezger* v. *Mezger*, [1937] P. 19, 23, *per* Lord Merriman, P.; *Simons* v. *Simons*, [1939] 1 K.B. 490, 494, 496, *per* Goddard L.J.

[2] [1895] A.C. 517, 540, *per* Lord Watson (italics supplied).

[3] [1906] P. 135. The decision was criticized by the present writer in *Canadian Bar Review*, 24 (1946), p. 73, mainly on the ground that New York law only recognized the South Dakota divorce because the wife was domiciled in South Dakota in the New York sense, and the English court could not so regard her without abandoning the rules (*a*) that the only domicil which is relevant in an English court is domicil in the English sense, and (*b*) that the domicil of a married woman is the same as that of her husband. The explanation may be that rule (*b*) was not so well established in 1906 as it is today, in which case the doctrine of *Armitage* v. *A.-G.* should not have been allowed to survive *Lord Advocate* v. *Jaffrey*, [1921] 1 A.C. 146, and *A.-G. for Alberta* v. *Cook*, [1926] A.C. 444 (P.C.). *Armitage* v. *A.-G.* is defended by Professor Tuck in *Canadian Bar Review*, 25 (1947), p. 226, and by Dean Griswold, loc. cit., at pp. 262–4; but their arguments have not convinced the present writer that his views on the decision are wrong. However, the principle of the decision has been recognized so often that, whether rightly decided or not, it must now be regarded as settled law. See *Cass* v. *Cass* (1910), 26 T.L.R. 305; *Clark* v. *Clark* (1921), 37 T.L.R. 815; *Walker* v. *Walker*, [1950] 4 D.L.R. 253; *Perin* v. *Perin*, [1950] Sc. L.T. 51; *Gatty* v. *A.-G.*, [1951] P. 444.

[4] *Perin* v. *Perin*, [1950] Sc. L.T. 51.

In view of the casual manner in which a highly complex question was treated in this case, a review of the circumstances in which a divorce granted in one American state will be recognized in the others will not, perhaps, be out of place. It must be emphasized, however, that the situation in the United States is a constantly changing one. Anything like a prophecy as to how the law is likely to develop can only be the merest guesswork.

(A) *In general*

Under the Constitution of the United States, unlike those of Canada and Australia, Congress has no power to legislate in matters of marriage and divorce: these are matters exclusively reserved to the states. The divorce laws of the several states display the widest divergencies. In South Carolina there was, before 1949, no divorce at all. In New York the only ground on which divorce can be had is adultery. In many states, 'extreme' mental cruelty is a ground for divorce; in some, the divorce laws are laxly administered, and divorces granted on this and other grounds are virtually divorce by mutual consent. Some states, notably Arkansas, Florida, Idaho, Nevada, and Wyoming, make a business of granting quick 'bargain counter' divorces. The most successful of these are Nevada and Florida, which between them attract nearly all the non-resident divorce business.[1] In Florida, a divorce can be granted if the plaintiff has been 'resident' in the state for ninety days; in Nevada the period is six weeks. Although the statutes of these states, as of many others, speak of 'residence', the local divorce lawyers know well that if the divorce is to enjoy extra-territorial recognition, some attempt must be made to show a technical domicil within the state. In the rare cases where there is a contest, the state courts cooperate by interpreting 'residence' to mean domicil. Even the Supreme Court of Nevada has been known to reverse a divorce decree for lack of this requirement.[2] In undefended cases, much ingenuity is spent in manufacturing evidence of domicil for purposes of the record. The plaintiff, on local advice, starts a local banking account, registers his motor-car within the state, takes out a local driving licence, and joins a local club.[3]

Nevada is a large state (about twice the area of England and Wales) with a small population (120,000 in 1940, equivalent to that of Oxford). Its largest town, Reno, is some 2,700 miles from New York as the crow flies—about the distance which separates London from Teheran. Englishmen may be proud of the fact that it was an English peer who first demonstrated the possibilities inherent in the short residence requirements of Nevada—but

[1] *Sherrer* v. *Sherrer*, 334 U.S. 343, 370 (1948), Mr. Justice Frankfurter dissenting.

[2] *Latterner* v. *Latterner*, 51 Nev. 285, 274 Pac. 194 (1929); *Lamb* v. *Lamb*, 57 Nev. 421, 65 P. 2d 872 (1937).

[3] See Mr. Justice Frankfurter's statement of the facts in *Coe* v. *Coe*, 334 U.S. 375 (1948); cf. Lorenzen, *Selected Articles on the Conflict of Laws* (1947), p. 411.

he paid for his experiment with three months' imprisonment in the first division.[1] It was not until 1931, when the Hollywood film industry was established and the residence requirement was reduced from six months to six weeks, that the Nevada divorce mill really got into its stride; and it was not until 1935 that the Florida state legislature, by narrow majorities, enacted its three-months law.

Although it has been calculated that in 1940 only 6 per cent. of the national total of divorces was granted in Nevada and Florida,[2] the actual figures are striking enough. For in 1940 the divorce rate for the whole of the United States was 200 per 100,000 of the population; in England it was 17; in Nevada 4,710.[3] In 1943 more divorces were granted in Nevada than in England and Wales (population 42 million).[4] In the same year it is estimated that Nevada received more than half a million dollars in divorce fees.[5] The divorce mill has proved more lucrative to the state than its gambling tables, its tourist industry, or its mines of silver and gold.

Article IV, s. 1, of the American Constitution provides that 'Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State': and Congress was given power to prescribe the effect thereof. Congress exercised this power in 1790 when it provided that 'such Acts, records and judicial proceedings shall have the same full faith and credit in every court within the United States, as they have by law or usage in the courts of the State from which they are taken'.[6] The object of the full faith and credit clause was to help transform an aggregate of independent sovereign states into a nation.[7] In the absence of further legislation by Congress,[8] the Supreme Court of the United States is the final arbiter of its meaning and scope. The clause compels, as between sister states, a modification of traditional theories of the conflict of laws: thus, it is no defence to an action on a sister state's judgment that its enforcement would violate the public policy of the forum.[9] On the other hand, it has been necessary to invoke conflict of laws doctrine in order to fill up gaps in the constitutional framework. Thus, the clause does not compel the recognition or enforcement of a sister state's judgment if that

[1] *Trial of Earl Russell*, [1901] A.C. 446. Earl Russell remarried after his Nevada divorce and was convicted of bigamy by his peers.

[2] *Sherrer* v. *Sherrer*, 334 U.S. 343, 370 (1948), Mr. Justice Frankfurter (dissenting).

[3] Rabel, *The Conflict of Laws: A Comparative Study*, vol. i (1945), p. 394.

[4] The figures were: Nevada, 11,399; England and Wales, 9,765.

[5] Rabel, op. cit., p. 394.

[6] Title 28, U.S. Code, s. 1738. The wording quoted is that of the 1948 revision.

[7] *Milwaukee County* v. *White Co.*, 296 U.S. 268, 276–7 (1935); *Riley* v. *New York Trust Co.*, 315 U.S. 343, 348–9 (1941); *Williams* v. *North Carolina* (*No. 1*), 317 U.S. 287, 303 (1942); *Magnolia Petroleum Co.* v. *Hunt*, 320 U.S. 430, 439 (1943); *Sherrer* v. *Sherrer*, 334 U.S. 343, 355 (1948); *Johnson* v. *Muelberger*, 340 U.S. 581, 584 (1951).

[8] As to the possibility of this see Cook, *Logical and Legal Bases of the Conflict of Laws* (1942), ch. 4.

[9] *Fauntleroy* v. *Lum*, 210 U.S. 230 (1908).

state lacked jurisdiction,[1] even if its jurisdiction depends on the existence of a fact, and it finds that the fact exists.[2] 'Otherwise', as Mr. Justice Frankfurter said,[3] 'a court's record would establish its power and the power would be proved by the record.' In divorce, jurisdiction traditionally depends upon domicil, because divorce is neither a remedy for breach of contract nor a remedy for a matrimonial wrong, but simply a determination by the state, as representing the community to which the parties belong, that it is no longer expedient to regard them as husband and wife.

The full faith and credit clause of the federal constitution, as interpreted by the Supreme Court of the United States, prescribes the conditions under which a divorce granted in one state must be recognized in the others. The possibility should not be overlooked that some states may recognize divorces granted by others, even when they are not constitutionally compelled to do so. However, the significance of this possibility has never been extensive and, in view of the wide expansion which the full faith and credit clause as applied to the divorce situation has received in recent years, it may safely be disregarded. For practical purposes, in order to discover whether a divorce granted in one state will be recognized in another, we do not need to look beyond the relatively few pronouncements of the Supreme Court. The matter is, however, a complicated one: we have to deal with a series of discordant decisions rendered by a divided court which is not bound by its previous decisions; and each decision seems to create more problems than it solves. There are at least three reasons for this unfortunate state of affairs. First, the problem of accommodating within a single national framework the divergent divorce policies of states like New York, where divorce is strict, and Nevada, where it is liberal, has proved beyond the grasp of judicial statesmanship. In constitutional theory, Nevada is the equal of New York, and its policies equally entitled to protection. Secondly, there is no agreement in the Supreme Court on the fundamental question of what is the correct basis of divorce jurisdiction and, in particular, whether a divorce decree is more analogous to a judgment *in rem* or a judgment *in personam*. Thirdly, it has long been held that a married woman can, for divorce and other purposes, establish a domicil separate from that of her husband.[4]

Down to the year 1905 the few decisions of the Supreme Court tell a

[1] *Thompson* v. *Whitman*, 18 Wall. 457 (1874).

[2] *Riley* v. *New York Trust Co.*, 315 U.S. 343 (1941).

[3] *Williams* v. *North Carolina* (*No. 2*), 325 U.S. 226, 234 (1945).

[4] This rule has been traced back to *Tolen* v. *Tolen*, 2 Blackf. 407 (Indiana 1831) (jurisdiction to divorce) and *Harding* v. *Alden*, 9 Greenl. 140 (Maine 1832) (recognition of foreign divorce): Griswold, loc. cit., pp. 255–6, or loc. cit., pp. 208–9. The rule was accepted by the Supreme Court as early as 1870: *Cheever* v. *Wilson*, 9 Wall. 108. It is now fully recognized in s. 28 of the American Law Institute's *Supplement* (1949) to the *Restatement of the Conflict of Laws* (1934).

consistent story. They are in complete harmony with the status theory of divorce. A divorce granted at the domicil of either spouse was entitled to full faith and credit in other states,[1] even if the defendant spouse was not served with process in the divorcing state and did not appear in the divorce proceedings.[2] The theoretical objection that the divorcing state lacked jurisdiction to alter the status of the spouse not domiciled therein, was met by the practical reply that 'a husband without a wife, or a wife without a husband, is unknown to the law'.[3] On the other hand, a divorce granted in a state where neither spouse was domiciled was not entitled to full faith and credit in other states,[4] even though the defendant spouse was served with process within the divorcing state and appeared in the divorce proceedings.[5]

In 1906 this simple picture was disrupted by the decision in *Haddock* v. *Haddock*.[6] Mr. and Mrs. Haddock were married in New York, where both were domiciled. A few hours after the ceremony, Mr. Haddock 'wrongfully fled' from his wife into the neighbouring state of Connecticut. Thirteen years later the husband, while domiciled in Connecticut, obtained a divorce there from his wife, who, however, was not served with process in that state and did not appear. Eighteen years after this divorce the wife obtained a decree of separation and alimony against the husband in New York. The Supreme Court of the United States, over the dissent of Mr. Justice Holmes and three other Justices, held that although the divorce was valid in Connecticut, it was not entitled to full faith and credit in New York. This decision caused widespread surprise.[7] It was difficult to reconcile it with previous decisions of the Supreme Court. 'There is no difference, so far as I can see', said Mr. Justice Holmes in his dissenting opinion, 'between *Atherton* v. *Atherton* and the present case, except that in *Atherton* v. *Atherton* the forum of the first decree was that of the matrimonial domicil, whereas in this the court was that of a domicil afterwards acquired.' Thus the state of matrimonial domicil had jurisdiction to alter the status of the absent spouse, but the state where the husband acquired a separate domicil after wrongfully leaving his wife had not. The fault or wrong of one spouse in leaving the other thus became a jurisdictional fact.

This legalistic doctrine was eventually eliminated in *Williams* v. *North*

[1] *Cheever* v. *Wilson*, 9 Wall. 108 (1870).
[2] *Atherton* v. *Atherton*, 181 U.S. 155 (1901).
[3] Ibid., p. 162.
[4] *Bell* v. *Bell*, 181 U.S. 175 (1901); *Streitwolf* v. *Streitwolf*, 181 U.S. 179 (1901).
[5] *Andrews* v. *Andrews*, 188 U.S. 14 (1903).
[6] 201 U.S. 562 (1906).
[7] See, e.g., Beale, 'Constitutional Protection of Decrees for Divorce', in *Harvard Law Review*, 19 (1906), p. 586; cf. Beale, 'Haddock Revisited', ibid., 39 (1926), p. 417. Dicey, in *Law Quarterly Review*, 22 (1906), p. 237, regarded the decision with 'sheer amazement'.

Carolina (*No. 1*).[1] Mr. and Mrs. Williams had been married and domiciled in North Carolina for twenty-five years. Mr. and Mrs. Hendrix had been married and domiciled in that state for twenty years. North Carolina is a state with a strict divorce policy. In May 1940 Mr. Williams and Mrs. Hendrix journeyed to Nevada; stayed there for six weeks in an auto court;[2] and then filed proceedings for divorce through the same attorney alleging almost identical grounds—extreme mental cruelty. The absent spouses were not served with process in Nevada and did not appear. Mrs. Hendrix testified that her husband was 'moody'; did not talk or speak to her 'often'; when she spoke to him he answered most of the time by a nod or a shake of the head; 'there was nothing cheerful about him at all'. In answer to a leading question put by her counsel, she agreed that her residence in Nevada could be described as 'indefinite permanent'. In due course both divorces were granted. On the very day that the second divorce was granted, Mr. Williams and Mrs. Hendrix were married in Nevada. Almost immediately afterwards they returned to North Carolina. The state prosecuted them for bigamous cohabitation. The prosecution relied on two arguments: first, the accused never were domiciled in Nevada; secondly, even if they were, the divorces were not entitled to full faith and credit in North Carolina because, under the rule in *Haddock* v. *Haddock*, Nevada was not the matrimonial domicil and the absent spouses had not been served in that state. The jury convicted. The conviction was upheld by the Supreme Court of North Carolina. But the Supreme Court of the United States quashed the conviction and remanded the case to North Carolina on the ground that that state had failed to give full faith and credit to the Nevada divorces. Since the jury's verdict was a general one, it had to be assumed that the prisoners were domiciled in Nevada at the time of the divorces, because the verdict might have rested on the second ground suggested by the prosecution. That ground was held to be inadequate and *Haddock* v. *Haddock* was expressly overruled. In the light of subsequent developments it might, perhaps, have been distinguished on the ground that there is a difference, so far as full faith and credit is concerned, between the effect of divorce on capacity to remarry and its effect on the husband's duty of economic support.

The prisoners were prosecuted again in North Carolina. This time the judge, in a thirty-page charge to the jury, instructed them carefully in the law of domicil. He charged them that while the prisoners had the burden

[1] 317 U.S. 287 (1942). From this decision Mr. Justice Murphy and Mr. Justice Jackson dissented.

[2] For the benefit of the uninitiated, an auto court is a roadside hotel designed for the use of motorists. It has the advantage of avoiding the parking problem in the big cities. Duration of stay is usually one night, and payment is always demanded in advance. If there is a radio, it is likely to be bolted to the table. One's contacts with the management are tenuous, and no questions are asked. All these places are convenient, and many are respectable.

of proving that they had changed their domicil to Nevada before the divorces, the recital of a Nevada domicil by the Nevada court was prima facie evidence in their favour. The jury again convicted. The conviction was again upheld by the Supreme Court of the state. But this time the Supreme Court of the United States, by a majority of six to three, refused to disturb it.[1] Nevada's recital of domicil did not foreclose North Carolina from deciding for itself where the prisoners were domiciled. Mr. Justice Frankfurter, speaking for the Court, said:[2]

'In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact. To permit the necessary finding of domicile by one State to foreclose all States in the protection of their social institutions would be intolerable.'[3]

The second *Williams* case decided that the Nevada divorces were not entitled to full faith and credit in North Carolina. It did not touch their status in Nevada[4] or in the other forty-six states,[5] for neither of those questions was before the court. Hence the weakness of the decision is, as

[1] *Williams* v. *North Carolina* (*No. 2*), 325 U.S. 226 (1945). From this decision Mr. Justice Rutledge, Mr. Justice Douglas, and Mr. Justice Black dissented. The dissenting opinions are subjected to detailed and critical analysis by Powell, 'And Repent at Leisure', in *Harvard Law Review*, 58 (1945), p. 930. Cf. *Esenwein* v. *Commonwealth of Pennsylvania*, 325 U.S. 279 (1945) (companion case).

[2] At p. 232. The whole opinion merits close attention.

[3] It is understood that, the first Mrs. Williams having died and Mr. Hendrix having remarried (presumably in reliance on the decision in *Williams 1*), the prosecuting authorities in North Carolina finally consented to release the prisoners from gaol on condition that they remarried in North Carolina.

[4] Under the Fourteenth Amendment to the Constitution of the United States, a judgment rendered without jurisdiction is void in the state which rendered it for lack of due process. It has been supposed by some that the *Williams 2* case might have been decided on this ground. But the fact seems indisputable that it was not (see especially the opinion of the Court at p. 234). Even if it could have been, other Nevada divorces might well be valid in that state though not entitled to full faith and credit elsewhere. A good example is *Rice* v. *Rice*, 336 U.S. 674 (1949), where a Connecticut court held that the husband was not domiciled in Nevada at the time of his divorce, and the majority of the Supreme Court refused to disturb its decision. Since Mr. Justice Jackson, dissenting, was prepared to hold that the burden of displacing the Nevada domicil had not been discharged, it is a safe assumption that the Nevada divorce could have withstood direct attack. In *Sutton* v. *Leib*, 342 U.S. 402 (1952), a remarriage following an *ex parte* Nevada divorce was annulled in New York at the instance of the second spouse for lack of a Nevada domicil at the time of the divorce. It was held that the New York nullity decree 'was entitled to full faith and credit throughout the Nation, in Nevada as well as in Illinois'. This holding does not, of course, affect the status of Nevada divorces in Nevada in the absence of such a nullity decree. There appears to be no case in which the Supreme Court has sustained a direct attack on a divorce decree for lack of domicil. On the whole question see Lorenzen, op. cit., p. 426, note 25; Powell, loc. cit., at pp. 935–44; Paulsen, 'Migratory Divorce: Chapters 3 and 4', in *Indiana Law Journal*, 24 (1948), p. 25; Carey and MacChesney, 'Divorces by the Consent of the Parties and Divisible Divorce Decrees', in *Illinois Law Review*, 43 (1948), p. 608; Reese and Johnson, 'The Scope of Full Faith and Credit to Judgments', in *Columbia Law Review*, 49 (1949), at pp. 168–70; Griswold in *Australian Law Journal*, vol. 25, pp. 248, 257, 262 (*Harvard Law Review*, 65 (1951), pp. 193, 212, 222, especially nn. 57 and 87); Cowen, 'Full Faith and Credit: The Australian Experience', in *Res Judicata*, 6 (1952), pp. 47–48.

[5] It is arguable that the decision might have been different if the prisoners had been prosecuted in some third state which lacked North Carolina's close concern with their matrimonial status. See Powell, loc. cit., at pp. 1002–3; Reese and Johnson, loc. cit., at p. 169.

the minority were not slow to point out, the uncertainty which it introduces into family relationships. The matrimonial status of a husband and wife, the validity of their second marriages, the legitimacy of their children, and even their right to personal liberty, might vary from state to state—an intolerable consequence for a federal nation, where the people are accustomed to move with the utmost freedom across state lines. Moreover, this uncertainty is intensified by the fact that collateral attack is based on that most elusive of all legal criteria, domiciliary intent.[1] It was perhaps a natural reaction to question the whole notion of domicil as the basis for divorce jurisdiction. Commenting on the decision, Professor Lorenzen said:[2]

'Domicil in this country has lost much of the stability it possessed in former times and especially in England. People are in the habit of changing their homes frequently from state to state. In many cases they have homes in several states. Again, married women are permitted to have domiciles different from their husbands. Under present conditions, it is frequently difficult, if not impossible, to ascertain where the domicile of a person is.'

The fact that American citizens could be sent to gaol in one state for having contracted a lawful marriage after a lawful divorce in another, though not unprecedented, was not palatable. It is not surprising, therefore, that soon after the *Williams* case the scope of the decision should have been restricted to *ex parte* divorces, that is, to divorces obtained without the participation of the defendant spouse and without service of process on him in the divorcing state. If the defendant is served in the divorcing state, or participates in the divorce proceedings either personally or merely by instructing counsel, and thus has an opportunity to litigate the question of domicil, he may not subsequently relitigate that question in another state, and the divorce is entitled to full faith and credit throughout the nation. This is the effect of *Sherrer* v. *Sherrer*[3] and its companion case *Coe* v. *Coe*.[4] In *Coe* v. *Coe*, Mr. and Mrs. Coe were domiciled in Massachusetts. Mrs. Coe obtained an order for separate support in that Commonwealth. Mr. Coe went to Nevada, obtained a divorce there after six weeks' residence, and returned to Massachusetts. But Mrs. Coe had followed her husband to Nevada and contested the divorce proceedings, though she admitted her husband's allegation of a Nevada residence.[5] Subsequently in Massachusetts she claimed, and was awarded, arrears under the original support order. In *Sherrer* v. *Sherrer* the contest was hardly less perfunctory. The parties were domiciled in Massachusetts. The wife obtained her

[1] Thus, Mr. Justice Rutledge pointed out in his dissenting opinion in *Williams 2* that if the prisoners had been tried separately instead of together, conceivably one jury might have convicted and the other acquitted, and that on evidence 'unvaried by a hair'.

[2] Op. cit., p. 423. [3] 334 U.S. 343 (1948). [4] 334 U.S. 378 (1948).

[5] If her main concern was to retain the benefit of the Massachusetts support order and not to obtain freedom to remarry, she would have been better advised, as will be seen, not to have participated in the Nevada proceedings.

divorce in Florida. The husband instructed counsel and was present in the Florida court during the hearing. But he remained in a side room and only appeared in open court to testify as to his ability to look after the children. His counsel did not cross-examine the wife or offer evidence either as to jurisdiction or to merits. Plainly he was anxious only to obtain the custody of the children and did not care whether he was divorced or not. After the divorce was granted Mr. and Mrs. Sherrer, like Mr. and Mrs. Coe before them, returned separately to Massachusetts. The Massachusetts court refused to recognize either divorce on the ground that Mr. Coe and Mrs. Sherrer were never domiciled in Nevada or Florida respectively. But in each case its decision was reversed by the Supreme Court of the United States, over vigorous dissent by Mr. Justice Frankfurter.[1]

These two decisions reduce the jurisdictional requirement of domicil to a shadow. They purport to be based on a theory of *res judicata*, that a litigant who has had his day in court may not subsequently reopen questions that might have been litigated there.[2] But more recent decisions carry the principle far beyond the limits of any such theory. They hold that if there has been a contest, however perfunctory, not only the parties but strangers who have never had a day in court are bound by the divorce decree. Thus, in *Johnson* v. *Muelberger*[3] the husband and his second wife were domiciled in New York. The wife obtained a divorce in Florida. She did not even trouble to reside there for the regulation ninety days. The husband appeared by an attorney and denied the wrongful acts alleged, but did not contest the wife's Florida residence. After the divorce the husband remarried and died. The daughter of his first marriage contested the third wife's right to a widow's share in his estate in New York. It was held that the daughter had no right to challenge the validity of the divorce in New York, since she could not have done so in Florida. The theory of *res judicata* can perhaps be stretched far enough to cover this decision, for the daughter was in a sense claiming through her father, who had made a will in her favour. In *Cook* v. *Cook*,[4] however, the principle was extended to a second spouse. A wife, who was domiciled in Virginia, obtained a divorce from her first husband in Florida. It was held that her second husband could not contest the divorce in Vermont in the absence of proof that the first husband had not been served in Florida and had not participated in the

[1] With whom Mr. Justice Murphy concurred.

[2] There was some previous authority for the proposition that the doctrine of *res judicata* applies to divorce proceedings: *Davis* v. *Davis*, 305 U.S. 32 (1938). But that case might have been distinguished, either on the ground that the Supreme Court held that the husband was domiciled in the divorce forum (the opinion of the Court is not very explicit on this point), or on the ground that the contest was a real one and not a sham. And *Andrews* v. *Andrews*, 188 U.S. 14 (1903) was authority the other way.

[3] 340 U.S. 581 (1951). From this decision Mr. Justice Frankfurter dissented.

[4] 342 U.S. 126 (1951). From this decision Mr. Justice Frankfurter dissented.

divorce proceedings. The second husband was not in any legal sense privy to the Florida divorce, though it is true that he counselled and procured it.[1] Thus divorce becomes assimilated to an action *in personam* so far as jurisdiction is concerned, but continues to operate *in rem* against third parties.

Unless the Supreme Court is prepared to draw some distinction between strangers who can and strangers who cannot contest the validity of a divorce granted in another state—and there are no signs at present that it is prepared to do so—it follows that even the state, on a prosecution for bigamy, is covered by this so-called *res judicata* doctrine. Thus, if Mrs. Williams and Mr. Hendrix, instead of remaining behind in North Carolina, had accompanied their spouses to Nevada and indulged in a mock contest there, or even if they had stayed at home and mailed instructions to counsel to appear for them, the bigamy prosecution would presumably have failed. Yet many would regard such a case as more shocking than the actual facts.

The Supreme Court has succeeded in imposing a measure of uniformity on the validity of divorces, but at a heavy price. The price is that anyone in the United States can now obtain a valid divorce by a combination of perjury and mutual consent. A 'contested' divorce will be valid throughout the nation, however perfunctory the contest. The result is to make it virtually impossible for any state effectively to maintain a strict divorce policy, except for those of its citizens who cannot afford the railway fare to Nevada or Florida and a short vacation from their employment.[2] In the absence of constitutional amendment empowering Congress to legislate for divorce, or the voluntary adoption by the states of a uniform divorce law (neither of which is practical politics), it should have been obvious that uniformity could only be purchased at this heavy price.[3]

The unedifying result is due, at least in part, to the failure of the Supreme Court to determine whether divorce is more analogous to an action *in personam* or an action *in rem*.[4] It is hard to resist the conclusion that those members of the Court who have been reaching for the brake instead of the

[1] The Vermont court might have denied relief to the second husband on the ground of unclean hands or condonation. But, as Mr. Justice Frankfurter pointed out, those defences were entirely a matter of state law and raised no constitutional question.

[2] To the extent that migratory divorce is a greater evil than divorce, of course it has to be admitted that responsibility lies with the strict divorce law of New York as well as with the open courthouse doors of Nevada. There are some who justify New York's strictness on the ground that Nevada's laxity provides a safety valve. One might as well defend meat rationing in England on the ground that famished Britons can buy steaks on the Continent and in Eire.

[3] 'The only way in which this Court can achieve uniformity, in the absence of Congressional action or constitutional amendment, is by permitting the States with the laxest divorce laws to impose their policies upon all the other States. . . . To permit such States to bind all others to their decrees would endow with constitutional sanctity a Gresham's Law of domestic relations' (*Sherrer* v. *Sherrer*, 334 U.S. 343, 366–7 (1948), Mr. Justice Frankfurter dissenting).

[4] In his dissenting opinion in *Williams 1*, Mr. Justice Jackson apparently thought that, if a divorce is to enjoy full faith and credit, there must be personal jurisdiction over the defendant as well as domicil of the plaintiff in the divorce forum. This would appear to be too strict a view, for the defendant could deny divorce by the simple expedient of remaining outside his domicil.

accelerator have had the worst of both worlds. For if divorce is analogous to an action *in rem*, it cannot be right to compel states to recognize divorces granted without domicil merely because the divorce forum had personal jurisdiction over the defendant spouse,[1] for the interest of the state in the status of its citizens is as great when there is a contest as when there is not. On the other hand, if divorce is analogous to an action *in personam*, it cannot be right to compel states to recognize divorces granted without personal jurisdiction over the defendant merely because the plaintiff is domiciled in the divorce forum.[2] The adoption of both theories in the Supreme Court has only led to confusion. Unless the Court was prepared to deny that the state has any greater interest in the status of its citizens than it has in an ordinary commercial transaction, it should surely have adhered to the status theory of divorce and treated domicil as the sole basis of jurisdiction. In recent years the only member of the Court who has remained faithful to this theory is Mr. Justice Frankfurter.

The last word on this subject has not yet been spoken. The powerful dissent of Mr. Justice Frankfurter in *Sherrer* v. *Sherrer* and *Coe* v. *Coe* is still on the books. His final sentences may yet prove prophetic:[3]

'Decisions of this Court that have not stood the test of time have been due not to want of foresight by the prescient Framers of the Constitution, but to misconceptions regarding its requirements. I cannot bring myself to believe that the Full Faith and Credit Clause gave to the few States which offer bargain-counter divorces constitutional power to control the social policy governing domestic relations of the many States which do not.'

Under the doctrine of *Armitage* v. *A.-G.*, there is some danger that the few states which offer bargain-counter divorces may come to control the social policy not only of the other American states, but of the entire English-speaking world.

(B) *Divisible Divorce*

In *Estin* v. *Estin*[4] and its companion case *Kreiger* v. *Kreiger*,[5] the Supreme Court introduced the concept of divisible divorce—a divorce effective to change the marital status of the parties, but ineffective to terminate the husband's duty of economic support. In the *Estin* case, Mrs. Estin brought a separation action against her husband in New York, where they were domiciled, and obtained an award of permanent alimony. The husband

[1] *Sherrer* v. *Sherrer*, 334 U.S. 343 (1948); *Coe* v. *Coe*, 334 U.S. 378 (1948); *Johnson* v. *Muelberger*, 340 U.S. 581 (1951); *Cook* v. *Cook*, 342 U.S. 126 (1951).

[2] *Atherton* v. *Atherton*, 181 U.S. 155 (1901); *Williams* v. *North Carolina* (*No. 1*), 317 U.S. 287 (1942).

[3] At p. 377. The whole opinion is so brilliant that it merits the closest study.

[4] 334 U.S. 541 (1948) (Mr. Justice Frankfurter and Mr. Justice Jackson dissenting). The concept of divisible divorce had been foreshadowed by Mr. Justice Douglas's concurring opinion (joined in by Mr. Justice Rutledge and Mr. Justice Black) in *Esenwein* v. *Commonwealth of Pennsylvania*, 325 U.S. 279 (1945).

[5] 334 U.S. 555 (1948).

then obtained an *ex parte* divorce in Nevada, and stopped payment under the New York alimony decree. The wife then sued for arrears of alimony in New York. The New York Court of Appeals gave judgment in her favour, although it found that the husband was domiciled in Nevada and therefore that the Nevada divorce was entitled to full faith and credit in New York and had conclusively altered the status of the wife. This decision was affirmed by the Supreme Court of the United States on two quite different grounds. The first ground was that New York had an interest in the economic welfare of its domiciliary, the wife, and could therefore compel the ex-husband to maintain her lest she became a public charge. The second ground was that the New York alimony decree was an intangible property right of the wife of which Nevada, lacking personal jurisdiction over her, could not deprive her consistently with the requirements of due process. One has only to change the facts to see that these two grounds may lead to different results. For instance, if the wife had participated in the Nevada proceedings, the first ground would still hold good, but the second would not. The second ground would appear to be the safer of the two. The New York Court of Appeals has held that the principle of *Estin* v. *Estin* does not apply if the wife participated in the Nevada divorce;[1] and it seems scarcely conceivable that the Supreme Court would permit a wife who had had an opportunity of litigating the question of support in the divorce forum to relitigate the question in the forum of her domicil. On the other hand, some writers think that the concept of divisible divorce is broad enough to cover cases where the wife's right to support has not yet been crystallized in a court order at the time of the divorce, at any rate in states where an ex-husband can be compelled to support an ex-wife and the wife does not lose her right to alimony by not asking for it in divorce proceedings.[2] If this is so, then the Supreme Court has infused new life into the corpse of *Haddock* v. *Haddock*, supposed to have been buried in the first *Williams* case.

The concept of divisible divorce has a moral for English judges. In *Bragg* v. *Bragg*[3] it was held that justices had a discretion, under section 7 of the Summary Jurisdiction (Married Women) Act, 1895, to continue a previous order for maintenance, notwithstanding a divorce decree subsequently obtained in England by the wife. Although it has been said that they have a similar discretion notwithstanding a valid foreign decree of divorce,[4] there is no reported case in which an English maintenance order has actually survived such a decree. And if the order is not for maintenance but for alimony in a suit for judicial separation, it seems that the court has

[1] *Lynn* v. *Lynn*, 302 N.Y. 193, 97 N.E. 2*d* 748 (1951).

[2] Paulsen, loc. cit.; Reese and Johnson, loc. cit., at p. 170; Morris, 'Divisible Divorce', in *Harvard Law Review*, 64 (1951), p. 1287, at p. 1293.

[3] [1925] P. 20 (Div. Ct.).

[4] *Kirk* v. *Kirk* (1947), 63 T.L.R. 422, correcting dicta in *Mezger* v. *Mezger*, [1937] P. 19.

no discretion in the matter and must discharge its order after a valid foreign divorce decree, for Hill J. said: 'I cannot order a man who has ceased to be a husband to pay alimony to a woman who has ceased to be a wife.'[1] This would seem to be altogether too simple a view. It is quite unacceptable that a blameless English wife should lose her right of support merely because her husband obtains a foreign divorce on some ground not sufficient for divorce by English domestic law. The grounds on which the foreign divorce was granted are irrelevant if the status of the spouses is in issue, but should be crucial so far as the wife's right to support is concerned, especially if its continuance is discretionary.[2] It is noteworthy that in all the English cases the wife appeared in the divorce proceedings. A very different question would be presented if she did not appear. If English courts should decide to continue the order for maintenance, alimony, or periodical payments in those circumstances, they would be following a path beaten out by the New York Court of Appeals and the Supreme Court of the United States. On the other hand, it is difficult to see how an English court could award support to a wife for the first time after a valid foreign divorce decree.[3]

IV. Reciprocal Recognition of Divorces Without Domicil

It is now necessary to consider Dean Griswold's suggestion[4] that English courts should recognize foreign divorces, even though they are neither based on domicil in the English sense nor validated by the principle of *Armitage* v. *A.-G.*, if they were granted in circumstances similar to those in which the English court has jurisdiction. The jurisdiction of the English court to grant a divorce without domicil is derived from three statutes: the Matrimonial Causes Act, 1937, section 13; the Matrimonial Causes (War Marriages) Act, 1944; and the Law Reform (Miscellaneous Provisions) Act, 1949, section 1.

[1] *Pastre* v. *Pastre*, [1930] P. 80, 82.

[2] In *Mezger* v. *Mezger*, [1937] P. 19, the justices exercised their discretion in the wife's favour on the ground that the foreign divorce obtained by her husband was granted for a cause not sufficient by English domestic law. The Divisional Court held, it is submitted wrongly, that this was not an adequate ground for the exercise of their discretion. The actual decision in this case can be supported on the ground that the wife defended the divorce proceedings and litigated the question of support.

[3] S. 19 (3) of the Matrimonial Causes Act, 1950, which provides that 'on any decree for divorce . . . the court may . . . direct the husband to pay . . . such monthly or weekly sums for the maintenance and support of the wife as the court may think reasonable', must surely be limited to English divorce decrees. (It has been held that the English court has no power under the corresponding section (now s. 25 of the Act of 1950) to vary a settlement in consequence of a foreign nullity decree: *Moore* (*falsely called Bull*) v. *Bull*, [1891] P. 279). Section 23 of the Act of 1950, which empowers the court to order periodical payments if the husband wilfully neglects to provide reasonable maintenance for the wife, presupposes that the parties are husband and wife; and the same is true of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949.

[4] In *Australian Law Journal*, vol. 25, at pp. 264–6 (reprinted in *Harvard Law Review*, 65 (1951), at pp. 226–31). Dean Griswold's suggestion is discussed by Graveson, 'Recognition of Foreign Divorce Decrees', in *Transactions of the Grotius Society*, 149 (1951), pp. 164–7.

Under the first statute, now re-enacted as section 18 (1) (*a*) of the Matrimonial Causes Act, 1950, the court has jurisdiction, in proceedings by a wife, if she has been deserted by her husband or the husband has been deported and the husband was, immediately before the desertion or deportation, domiciled in England.

Under the second statute the court has jurisdiction, in proceedings by a husband or a wife, if the wife was immediately before the marriage domiciled in England: but only if (*a*) the marriage was celebrated between 3 September 1939 and 1 June 1950, (*b*) the parties have not resided together since the marriage in the country of the husband's domicil, and (*c*) proceedings are brought before 1 June 1955.

Under the third statute, now re-enacted as section 18 (1) (*b*) of the Matrimonial Causes Act, 1950, the court has jurisdiction, in proceedings by a wife, if she is resident in England and has been ordinarily resident there for a period of three years immediately before the commencement of the proceedings, and the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man.[1]

Under section 2 of the Act of 1949 and under the Law Reform (Miscellaneous Provisions) Act, 1951, of the Northern Irish Parliament, the courts of Scotland and Northern Ireland have jurisdiction to dissolve marriages in precisely similar circumstances as the English court has under section 18 (1) (*b*) of the Act of 1950. But none of these Acts (except that of 1944) contains any provision for the mutual recognition of such divorces in other parts of the United Kingdom. It is apparent that there is a gap in the Acts which the doctrine of *Armitage* v. *A.-G.* can only partially fill. If, for instance, an American domiciled in California marries a Scotswoman in Scotland, and the parties live together for a time in the United States, and the wife returns to Scotland and after three years' residence obtains a divorce there under section 2 of the Act of 1949, it is highly probable that the divorce would be recognized as valid in England. For on these facts the Californian court would almost certainly regard the wife as having resumed her domicil in Scotland, and would probably recognize the Scottish divorce as valid.[2] But if the husband had been a Canadian domiciled in British Columbia, the doctrine of *Armitage* v. *A.-G.* would be of no assistance, because Canadian courts are still committed to the rule that the domicil of the wife is the same as that of the husband,[3] and therefore there

[1] The object of this exception is, of course, to avoid conflicts of jurisdiction within a limited geographical area. If the husband is domiciled within this area, it is no hardship for the wife to follow.

[2] It is necessary to speak with hesitation, because American writers have almost completely ignored the question when American courts will recognize politically foreign divorces. Some state courts might be satisfied with the domicil of one party within the foreign country, others might require the foreign court to have personal jurisdiction over the defendant.

[3] *A.-G. for Alberta* v. *Cook*, [1926] A.C. 444 (P.C.).

would be no basis on which the British Columbian court could recognize the Scottish divorce. Even in the Californian case it is, to put it mildly, a little peculiar if an English court cannot recognize a Scottish divorce except through the medium of Californian rules of the conflict of laws.

The natural reaction of an English lawyer to such a state of affairs would perhaps be that the Parliamentary draftsman had blundered badly. Dean Griswold has put a more favourable construction upon this provision. He regards it as 'a fair inference that that validity, within the United Kingdom, was simply, and properly, assumed'.[1] 'Is it conceivable', he asks,[2] 'that an English court would hold that a divorce granted in Scotland under section 2 of the . . . Act [of] 1949, is not entitled to recognition in England—when an English court would grant a divorce under exactly similar circumstances?' He draws the conclusion that 'a divorce should be recognized in the forum when it was granted under circumstances which are those under which the forum will itself grant a divorce; in other words, that the recognition rule applied by a court should follow, and indeed be a reflection of, its jurisdictional rule'.[3]

On the face of it, Dean Griswold's suggestion is open both to a narrow and to a wide interpretation. On a narrow interpretation, the suggestion is confined to cases where the jurisdictional rule of the foreign state is framed in terms exactly analogous to that of the forum. If this interpretation is correct, Dean Griswold's suggestion affords no basis for the recognition of American divorces in England, because in only two states is the residence requirement as long as three years, and in none of them is anything said about the husband not being domiciled in any part of the United Kingdom or in the Channel Islands or the Isle of Man. On a wide interpretation, the suggestion extends to cases where the wife in fact satisfies the English jurisdictional requirements in the foreign state, though the foreign state's requirements may be different. It is plain that Dean Griswold intended his suggestion to bear this wider interpretation. 'It makes no difference', he says, 'whether the statutory provision proceeds in terms of residence or in terms of the deserted wife retaining a separate domicil. *It is the factual situation which is important.*'[4] And a footnote makes it plain that the suggestion is meant to extend to the recognition in England of American divorces.[5]

Dean Griswold's suggestion is undeniably attractive. Moreover, it has history on its side, for there can be no doubt that the English recognition rule of domicil, derived from cases like *Warrender* v. *Warrender*,[6] *Shaw* v. *Gould*,[7] and *Harvey* v. *Farnie*,[8] exerted an influence on the formulation of

[1] Loc. cit., at p. 260 (loc. cit., at p. 219).
[2] Ibid. p. 266 (230).
[3] Ibid. p. 264 (227).
[4] Ibid. p. 265 (228) (italics supplied).
[5] Ibid., note 108.
[6] (1835), 2 Cl. & F. 488.
[7] (1868), L.R. 3 H.L. 55.
[8] (1882), 8 App. Cas. 43.

the jurisdictional rule of domicil in *Le Mesurier* v. *Le Mesurier*.[1] Nevertheless, it must reluctantly be conceded that there are strong arguments against it, at least in its wider form. In the first place, in section 4 of the Act of 1944 Parliament made provision for the recognition in England of divorces granted under parallel legislation in British Dominions and colonies. Hence it is arguable that the omission of Parliament to make any corresponding provision in the Acts of 1949 and 1950 was deliberate.[2] Secondly, it is more difficult to advocate a continuous process of action and reaction between the jurisdictional rule and the recognition rule when changes in the former have been made by statute than it would be if they had been made by the courts. The case of *Schibsby* v. *Westenholz*[3] shows that it may be beyond the power of judicial legislation to keep the recognition rule abreast of statutory changes in the jurisdictional rule. For in that case the court refused to enforce a French judgment *in personam* because the defendant had not been present in France when the French action was started, although it was much taken with the argument that under sections 18 and 19 of the Common Law Procedure Act, 1852 (now Order XI, rule 1 of the Rules of the Supreme Court), the English court would have assumed jurisdiction over a defendant not present in England in precisely similar circumstances. Thirdly, the recognition rule in suits for nullity does not reflect the jurisdictional rule, even to the extent that the jurisdictional rule is judge-made: for while English courts have jurisdiction to annul a void marriage if the petitioner is domiciled in England,[4] they will not apparently recognize foreign nullity decrees based on the domicil of the petitioner alone.[5]

V. Invalid Divorces

It remains to consider the fourth proposition advanced at the beginning of this article, namely, that an American divorce granted in any other circumstances will not be recognized in England. There is ample authority for this proposition.[6] It is unlikely that an English court would question it.[7]

[1] [1895] A.C. 517.

[2] This argument prevailed with the Scots court in *Warden* v. *Warden*, [1951] S.C. 508. However, as Dean Griswold points out, there was no evidence in that case that the wife had been 'ordinarily resident' in Nevada for three years. Moreover, the court was incorrect in supposing that under s. 4 of the Act of 1944, Orders in Council can be made in relation to American divorce decrees.

[3] (1870), L.R. 6 Q.B. 155.

[4] *White* v. *White*, [1937] P. 111; *Mehta* v. *Mehta*, [1945] 2 All E.R. 690; *Apt* v. *Apt*, [1948] P. 83 (C.A.); *De Reneville* v. *De Reneville*, [1948] P. 100 (C.A.).

[5] *Chapelle* v. *Chapelle*, [1950] P. 134. The present writer does not desire to lay too much stress on this argument, because he agrees with his learned colleague Mr. Cross (in *International Law Quarterly*, vol. 3, p. 247) that that case was wrongly decided. It is cited here simply to show that English courts tend to exercise a wider jurisdiction than they are willing to concede to foreign courts.

[6] *Dolphin* v. *Robins* (1859), 7 H.L.C. 390; *Shaw* v. *Gould* (1868), L.R. 3 H.L. 55; *Bonaparte* v. *Bonaparte*, [1892] P. 402; *Green* v. *Green*, [1893] P. 89; *Trial of Earl Russell*, [1901] A.C. 446; *Lankester* v. *Lankester*, [1925] P. 114; Dicey, Rule 72.

[7] Professor Graveson makes the interesting suggestion that *Mezger* v. *Mezger*, [1937] P. 19,

Yet it may be necessary to formulate exceptions if injustice is to be avoided. Suppose, for instance, that a husband and wife are domiciled in England. The wife goes to Nevada, establishes a residence there for six weeks, and obtains a divorce. Plainly, the divorce will not be recognized in England, even if the wife intends to reside permanently in Nevada, because the husband, and therefore the wife, remains domiciled in England. But now suppose that the wife remarries in Nevada, lives there with her second 'husband', and then claims the share of a surviving spouse on the death of her first husband intestate. There is no way of rejecting such an unmeritorious claim except by adopting some form of the doctrine of estoppel. This is a device which has been widely adopted by some American courts, and especially by those of New York, in order to give some colour of validity to technically invalid divorces.[1] In Canada it has been held that a wife who remarried after an invalid divorce obtained by her in Washington could not claim a widow's share in British Columbia in her first husband's intestacy.[2] Whether the English courts will be prepared to follow this decision remains to be seen.[3]

In Dicey's *Conflict of Laws*[4] it is stated that 'where the foreign court is held not to have had jurisdiction in the main suit (*sc.* of divorce), ancillary decrees such as those for maintenance of the wife, and custody of children, will not be enforced in England'. So far as maintenance decrees are concerned, this conclusion does not seem a logically necessary one, though no doubt there are sound reasons of policy behind the distaste with which English judges regard attempts to enforce heavy arrears of maintenance.

The three cases cited for Dicey's proposition are *Re E.E.L.*,[5] *Papadopoulos* v. *Papadopoulos*,[6] and *Simons* v. *Simons*.[7] In *Re E.E.L.* the husband was domiciled in Northern Ireland; the wife obtained a divorce in Florida;

opens the door to the recognition of foreign divorce decrees based on nationality and not on domicil: see *Transactions of the Grotius Society*, 37 (1951), at pp. 156–7; Graveson, *Conflict of Laws* (2nd ed. 1952), p. 358; the same, 'Choice of Law and Choice of Jurisdiction in the English Conflict of Laws', in this *Year Book*, 28 (1951), at p. 289. This suggestion, of course, affords no basis for the recognition of American divorces in England, for American citizens are not 'nationals' of any particular state.

[1] The leading case in New York is *Krause* v. *Krause*, 282 N.Y. 355, 26 N.E. 2d 290 (1940). Under the New York doctrine, a spouse is estopped from contesting a divorce granted in another state if (1) he obtained it; (2) he was personally served in the divorcing state; (3) he voluntarily appeared; or (4) he remarried after the divorce. The doctrine does not (yet) apply to (1) the spouse whose conduct induced the other to seek a divorce; (2) children; (3) the state, e.g. on a prosecution for bigamy; (4) a second spouse (there is dissent on this last point). See Weiss, 'A Flight on the Fantasy of Estoppel in Foreign Divorce', in *Columbia Law Review*, 50 (1950), p. 409.

[2] *Re Graham's Estate*, [1937] 3 W.W.R. 413.

[3] The case of *Bonaparte* v. *Bonaparte*, [1892] P. 402, is an obstacle to the development of an estoppel doctrine in England. There a second 'husband', who had counselled and procured an invalid divorce in Scotland and subsequently 'married' the wife, later petitioned for nullity in England. He was held not to be estopped from challenging the validity of the divorce.

[4] 6th ed. (1949), p. 375.

[5] [1938] N. Ir. 56.

[6] [1930] P. 55.

[7] [1939] 1 K.B. 490.

the Florida court awarded her the custody of the child; it was held that, since the Florida divorce was not entitled to recognition in Northern Ireland, the custody decree was not binding either. But it appears from the decision of the Privy Council in *McKee* v. *McKee*[1] that foreign custody decrees are not binding even if the parties were domiciled in the foreign state and the divorce decree is entitled to recognition. The reason is that the welfare of the child is the paramount consideration to which all others must yield. It must now be assumed, therefore, that the case of *Re E.E.L.* was rightly decided, but for the wrong reason, and that it no longer supports Dicey's proposition.

In *Papadopoulos* v. *Papadopoulos*, a man domiciled in Cyprus married a woman domiciled in France at a London register office. The marriage was valid by English law, but void by the law of Cyprus because no Greek priest was present at the ceremony. The wife sued the husband in Cyprus, claiming (*a*) a declaration that the marriage was valid, (*b*) maintenance, and (*c*) in the event that the marriage was invalid, damages for breach of promise. The Cyprus court made an order by consent declaring the marriage void and ordering the man to pay £380 to the woman 'in full satisfaction of all claims', which order he duly complied with. Fifteen years later the wife obtained an order for maintenance from a court of summary jurisdiction in England. The husband appealed against this order on the grounds that the woman was not his wife and that she was bound by the order of the Cyprus court not to make any further claims on him. The Divisional Court held, as we have seen,[2] that the Cyprus nullity decree was not entitled to recognition in England because the Cyprus court lacked local competence to pronounce decrees of nullity; and that the further order of the Cyprus court could not be severed from the main order and thus afforded the husband no defence to the wife's claim. Several reasons, however, combine to prevent this decision from establishing Dicey's proposition. In the first place, the order of the Cyprus court proceeded on the footing that the parties were not, and never had been, husband and wife. It was an award of damages for breach of promise, not an award of maintenance. Secondly, even if the order was for maintenance, the Cyprus court had the same powers as the English High Court of Justice, except that it could not annul or dissolve a marriage. Hence, as Hill J. pointed out,[3] 'it had no power to make an order for maintenance consequential upon a decree of nullity. It had no power to make a decree of dissolution and did not purport to do so, neither did it purport to make a decree of restitution of conjugal rights or judicial separation, and therefore it had not the power to make an order for maintenance consequential thereon.' Thirdly, even if the order was for maintenance and the Cyprus court had power to make such an order, the order was for a

[1] [1951] A.C. 352 (P.C.). [2] *Ante*, p. 288. [3] [1930] P. 55, 69.

lump sum. The relationship of husband and wife is a continuing one; therefore, no court has power to foreclose courts in other jurisdictions from dealing with the future economic incidents of the relationship.

In *Simons* v. *Simons*, the domicil of origin of the parties was English; while they were living in Massachusetts the wife obtained a divorce there; the Massachusetts court made an order for maintenance. After the parties had returned to England the wife sued for eleven years' arrears of maintenance under the Massachusetts order (her claim was subsequently reduced to six years' arrears because of the Statute of Limitations). Goddard L. J., as he then was, sitting as an additional judge of the King's Bench Division, held that the wife had failed to discharge the onus of proving that the husband had acquired a domicil of choice in Massachusetts; that the divorce was therefore not entitled to recognition in England; and that the order for maintenance could not be severed and was not binding.

Evidently this case comes nearest to establishing Dicey's proposition. But it is a highly unsatisfactory decision.[1] The learned judge assumed that 'if the court in Massachusetts had no power to grant a decree of divorce, it had no power and no jurisdiction to order maintenance, *which it could order only if it decreed a divorce*'.[2] There was, however, no evidence that the power of the Massachusetts court was thus limited. If it had power, as the English High Court now has power,[3] to award maintenance unconnected with the grant of any other relief, the reasoning of Hill J. in *Papadopoulos* v. *Papadopoulos* would cease to be applicable. Even if it had no power to award such maintenance, it certainly had power, unlike the Cyprus court in the *Papadopoulos* case, to grant a divorce on any jurisdictional basis it pleased. No reason is seen, therefore, why the order for maintenance, to the extent that it was final and conclusive, should not have been enforced in England. After all, an order for maintenance is *in personam*, and the Massachusetts court had both parties before it and was in the best position to inquire into the merits. If the husband had covenanted to make payments to the wife, and the wife had obtained a judgment for arrears in

[1] (*a*) The court thought that, because the husband was not domiciled in Massachusetts in the English sense, the Massachusetts divorce was invalid in Massachusetts (pp. 494, 496). This is plainly untrue. (*b*) The court thought that the Cyprus nullity decree in *Papadopoulos* v. *Papadopoulos* was refused recognition in England because the formal validity of the marriage was a matter for English law as the *lex loci celebrationis* (pp. 497–9). This was not the ratio of the *Papadopoulos* case, and is inconsistent with *De Massa* v. *De Massa*, [1939] 2 All E.R. 150 n., and *Galene* v. *Galene*, [1939] P. 237. (*c*) The court assumed, not from evidence but from the previous case of *Beatty* v. *Beatty*, [1924] 1 K.B. 807, that 'American' maintenance orders are final and conclusive as to past instalments (p. 495). *Beatty* v. *Beatty* was concerned with a New York, not a Massachusetts, order. Moreover, in *Beatty* v. *Beatty* the finality and conclusiveness of the New York order was not proved by evidence but deduced from *Sistare* v. *Sistare*, 218 U.S. 1 (1910). In that case the alimony decree was made in 1899. Thus Goddard L.J. precariously assumed that a Massachusetts order made in 1924 was final and conclusive because a New York order made in 1899 was final and conclusive.

[2] [1939] 1 K.B. 490, 497 (italics supplied).

[3] Matrimonial Causes Act, 1950, s. 23.

Massachusetts, an action in England to enforce the Massachusetts judgment would certainly have succeeded.

The question whether maintenance decrees annexed to invalid American divorces should be enforced in England is now, however, largely academic. For the High Court now has power under section 23 of the Matrimonial Causes Act, 1950, to order periodical payments to a wife independent of the grant of any other relief. It has jurisdiction to do so when it has jurisdiction to decree judicial separation—that is, when the respondent is resident in England. Arrears of maintenance under a foreign maintenance decree cannot, of course, be effectively enforced in this country unless the husband can be served in England and has property here or earns his living here. In most cases, therefore, a wife who has obtained a maintenance decree annexed to an invalid foreign divorce and who seeks support from her husband in England can choose between two courses of action. She can either attempt to enforce the foreign maintenance decree (to the extent that it was final and conclusive) in the Queen's Bench Division, or she can apply to the Divorce Division under section 23 of the Act of 1950. Her attempt to enforce the foreign maintenance decree would presumably fail unless the court was prepared to reconsider *Simons* v. *Simons*. Though that case lends itself to reconsideration, there is much to be said on policy grounds in favour of leaving the whole matter to the Divorce Division, which can deal with the wife's needs and the husband's earning capacity as they now exist, untrammelled by any previous orders.

VI. Conclusions

We are now in a position to restate in tabular form the four propositions with which this article began:

(1) An American divorce granted in the state in which both parties were domiciled (in the English sense) will be recognized in England, even if the cause is insufficient for divorce by English domestic law. Such a divorce is not open to challenge on the ground of public policy, procedural defects, fraud, want of notice, or failure to comply with the residence requirements of the American state: though it might perhaps be challenged on the ground that the court had no local competence to grant divorces.

(2) If the divorce is granted in a state where the parties were not domiciled (in the English sense), but is recognized as valid in the state where they were so domiciled, it will be recognized in England to the same extent as in (1) above.

(*a*) A divorce granted in one American state will be recognized as valid in the others if (i) at least one party was domiciled (in the sense of the second state) in the first state, or (ii) the defendant spouse was

served with process in the first state or appeared either personally or through counsel in the divorce proceedings.

(*b*) An *ex parte* divorce obtained by the husband without the participation of the wife does not necessarily terminate her right to support in other states, and should not prevent her from enforcing a prior English support order.

(3) An American divorce will probably not be recognized in England merely because the English court would have had jurisdiction by statute in similar circumstances.[1]

(4) An American divorce granted in any other circumstances will not be recognized in England. It is possible, however, that a party might be estopped from relying on it in some circumstances, and that ancillary decrees, e.g. for maintenance, might be recognized.

[1] See, however, dicta of the Court of Appeal in *Travers* v. *Holley*, [1953] 3 W.L.R. 507, which was reported after this article went to press.

REPATRIATION OF DESERTERS

By L. B. SCHAPIRO

I

MUTUAL repatriation of prisoners of war at the termination of war is now a well-established rule in the practice of states. But international law provides no such clear-cut answer to the question whether repatriation must include members of the belligerent forces who have at some stage deserted to the other side. Few authors have examined the question, and of those who have many have left it unsolved.[1] Nevertheless, the practice of belligerents has long recognized that a distinction must be made between the prisoner who is captured by force of arms and the deserter who surrenders of his own free will. That the distinction was well established in ancient Greece is evident from the fact that treaties are extant in which provision is made separately for the exchange of prisoners and for the exchange of deserters —a fact which prompts the inference that, in the absence of special stipulations, deserters would not be included among prisoners to be exchanged.[2] Grotius is quite categorical on the subject: '"We receive a deserter by the law of war" says Celsus: that is, it is not contrary to the law of war for us to receive him who abandons the side of the enemy and chooses our own.' And he adds a footnote: 'And such persons are not to be surrendered, unless this has been agreed upon in the terms of peace. . . .'[3] Gentili before him, after recording the fact that 'a stipulation with regard to returning them [deserters] along with the captives is usually made in treaties', had criticized this practice as unjust.[4] The distinction between prisoners of war and deserters is also preserved in the official compilations of the usages of war promulgated by some states. According to British usage, 'deserters from the enemy should be treated as prisoners of war unless special circumstances render it desirable to liberate them'.[5] The Spanish

[1] See, e.g., Fauchille, *Traité de droit international* (8th ed., 1921), vol. ii, p. 198, 'la question est délicate'. Among those who assert categorically that deserters may never be repatriated see, e.g., Calvo, *Le Droit international théorique et pratique* (1896) vol. iv, § 2142; Funck Brentano et Sorel, *Précis de droit des gens* (1887), p. 293; Pradier-Fodéré, *Traité de droit international public* (1897), vol. vii, p. 183; Rolin, *Le Droit moderne de la guerre* (1920), vol. i, p. 384; for a contrary view see Charpentier, *La Convention de Genève du 27 juillet 1929 et le droit nouveau des prisonniers de guerre* (1936), p. 156, who takes the view that for a state to concern itself with the fate of prisoners whom it repatriates to another state is inconsistent with the principle of sovereignty; and Payrat, *Le Prisonnier de guerre dans la guerre continentale* (1910), p. 361, who takes a similar view.

[2] See the instances quoted in Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, vol. ii, pp. 68–69, 282.

[3] *De iure belli ac pacis*, Book III, ch. i, xxii.

[4] *De iure belli* (1598), Book III, ch. xvii.

[5] *Land Warfare* (1912), § 64; the language of the current Chapter xiv of the *Manual of Military Law* is virtually identical—see *Amendments* (No. 12) June 1936, reprinted 1940, § 55.

Military Regulations provide that deserters should be considered 'in principle' as prisoners of war, 'but without confounding the two categories'. Their subsequent disposal varies according as they do or do not offer their services with the Spanish colours, but those who do not must remain at headquarters 'until their ultimate fate is decided'.[1] The instructions of the United States to the armies in the field provide that 'spies, war-traitors and war rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel authorised by the government.'[2] The French Ordinance of 21 March 1893, while providing that deserters from the enemy 'sont également considérés comme prisonniers de guerre' (Article 2), went on to say that they 'ne sont jamais compris parmi les prisonniers de guerre échangés'.[3]

Before considering what light is thrown on this question by state practice, in particular by treaties, it is convenient to summarize the principal reasons which can be adduced in favour of separate treatment for deserters and for prisoners in the matter of repatriation at the end of hostilities. First, there is the humanitarian principle: to repatriate a deserter will often mean to surrender for certain punishment someone who has sought asylum. Secondly, the deserter may have rendered service to the belligerent to whom he surrenders by enlisting with his colours, or at least by weakening the resistance of his opponent. He may have surrendered in response to an appeal to desert, and in reliance upon express or implicit promises of safety. To repatriate him, without concern for his subsequent fate, would therefore be an act of bad faith. Thirdly, wars have often been fought over issues of principle. Desertion from the ranks of one belligerent may in such circumstances be an act not of cowardice but of political faith, an act which not only weakens the moral case of the belligerent from which the desertion takes place but also strengthens the moral case of the belligerent to whom the deserter flees. To surrender a deserter in such circumstances may be not only an act of bad faith and akin to the surrender of the political refugee, but also an act of bad policy, since it may discourage others from doing the same in any future war.

The practice of states does not support the categorical assertion that deserters are never repatriated together with prisoners of war. If the practice of excluding deserters from repatriation had become universal by the

[1] Quoted in Manuel González Hontoria y Fernández Ladreda, *Tratado de derecho internacional público* (1930), vols. vi–viii, pp. 160–1.

[2] *Instructions for the Government of the Armies of the United States in the Field, General Orders*, No. 100, 24 April 1863, § 103, quoted in Moore, *Digest*, vol. vii, p. 232. And cf. now, *Basic Field Manual, Rules of Land Warfare* (1940), § 160, where this practice is stated to be 'according to the unwritten law of war'.

[3] (I.e. exchanged during hostilities). Quoted in Pradier-Fodéré, *Traité de droit international public* (1897), vol. vii, p. 183; cf. Bonfils, *Manuel du droit international public (Droit des gens)* (7th ed. by Fauchille, 1914), p. 786: 'en pratique on ne les [deserters] livre généralement pas'.

time that the mutual repatriation of prisoners of war had become the established usage of states—that is to say, by the end of the eighteenth century—one would expect to find a reflection of this practice in treaties relating to such repatriation. An examination of a number of such treaties shows that this has not been the case. Deserters are for the most part neither excluded nor included as such. Nor, incidentally, were deserters excluded *eo nomine* from the comprehensive treaties concerned with the exchange of prisoners and concluded occasionally in the midst of a long-drawn-out war, or in time of peace in anticipation of war. Among the early treaties, deserving of notice both for their detailed and comprehensive provisions relating to exchange and for the fact that they are little known, may be cited the Treaty on the Exchange of Prisoners between France and England of 6 February 1759 (in the middle of the Seven Years War).[1] There exists also a similar cartel on the exchange of prisoners between Britain and the United States of 12 May 1813.[2] With the exceptions and qualifications noted below, the pattern of the clauses relating to the repatriation of prisoners of war in peace and armistice treaties of the nineteenth century is generally the same: no distinction is drawn in the treaty between prisoners and deserters. Examples from United States practice are the Treaty of Ghent of 24 December 1814, Article III, and the Treaty of Peace with Mexico of 2 February 1848, Article IV, which were similarly worded: 'All prisoners of war taken on either side shall be restored as soon as practicable.'[3] The armistice conventions of 23 April 1814 between Britain and France, and between France on the one hand and Austria, Prussia, and Russia on the other contain a similar clause: 'On both sides the prisoners, officers and soldiers of land or sea or of any other description whatever, and particularly hostages, shall be immediately sent back to their respective countries without ransom and without exchange.'[4] In one instance, at any rate, deserters have been specifically included in the repatriation clause of a peace treaty—the Treaty of Oran of 26 February 1834 between France and Abd-el-Kader, Article V.[5] Of course, the fact that these treaties dealing with the exchange and repatriation of prisoners do not mention deserters does not mean that deserters were invariably included among prisoners for exchange or repatriation. It has already been noted that some states, such as the United States of America, excluded deserters from exchanges, unless specially provided for. And, as will be seen below, it became the

[1] Public Record Office, WO 34/10, p. 63.

[2] *British and Foreign State Papers*, vol. i, part 2, pp. 1410–17.

[3] Malloy, *Treaties, Conventions etc. between the United States of America and Other Powers*, vol. i, p. 612; and ibid., p. 1109.

[4] *British and Foreign State Papers*, vol. i, part 1, pp. 148–9.

[5] Quoted in *Corpus Pacificationum, Systematische Zusammenstellung der Texte der Friedensverträge 1792–1913*, p. 117. This useful compilation of peace treaties, analysed by contents, published by the German Government during the First World War, contains on pp. 379–96 a selection of some forty-six repatriation clauses extracted from peace treaties.

established practice of some states in the nineteenth century to exclude certain categories of deserters from the category of prisoners of war, and therefore from repatriation.

II

Moreover, it would be inaccurate to infer that eighteenth- and nineteenth-century practice ignored the distinction between prisoners and deserters which had been so clearly formulated by Grotius. There is available evidence of recognition of the distinct status of the prisoner-deserter. It can be classified under the several dominant motives listed above. There is, in the first instance, the humanitarian motive. Already in the eighteenth century, according to Vattel, 'turncoats and deserters whom the conqueror finds among his enemies are guilty of a crime against him and he is undoubtedly justified in putting them to death. . . . However, at the present day, when desertions are unfortunately so common, the number of offenders makes it in a way necessary to show mercy, and it is quite usual in capitulations to allow the evacuating garrison a certain number of covered waggons in which they hide the deserters.'[1] In the nineteenth century the main evidence of the fact that belligerents were not indifferent on humanitarian grounds to the fate of members of their former enemy's forces whom they restored after the termination of hostilities is to be found in the very frequent amnesties provided for in treaties of peace.[2] A notable early instance of such an amnesty is to be found in the Preliminary Articles of Peace signed on 30 November 1782 between Britain and the United States and which became in substance the Treaty of Peace. By Article 7: 'All prisoners on both sides shall be set at liberty. . . .' However, deserters who may have been included in the category of prisoners of war, and who might therefore on repatriation suffer vengeance at the hands of their own state authorities, were protected by the provisions of Article 6: 'That there shall be no future confiscations made, nor any prosecutions commenced against any Person or Persons, for or by reason of the part which he or they may have taken in the present War, and that no person shall on that account suffer any future Loss or Damage either in his Person, Liberty or Property. . . .'[3] In the course of the nineteenth century such complete amnesty clauses became usual in the practice of Russia in concluding her peace treaties. Such, for example, is the effect of Article XI of the Treaty of Peace between Russia and Sweden of 17 September 1809.[4] Amnesty clauses covering in the

[1] *Le Droit des gens ou principes de la loi naturelle*, Book III, ch. viii, § 144.

[2] Twenty-eight such amnesty clauses are quoted in *Corpus Pacificationum*, pp. 89–99, but the list is far from complete.

[3] Hunter Miller (editor), *Treaties and Other International Acts of the United States of America*, vol. ii, Document No. 7, p. 99.

[4] 'Il y aura dès aujourd'hui . . . une amnestie générale pour les sujets respectifs dont l'opinion ou les faits . . . pendant la présente guerre les auront rendu suspects ou soumis à un jugement', Martens, *Nouveau recueil*, vol. i, pp. 25–26.

widest terms any proceedings for war treason or collaboration, and therefore normally adequate to cover the case of any deserter repatriated together with prisoners of war, were included in the series of peace treaties between Russia and Turkey concluded between 1774 and 1878.[1] The practice was not confined to Russia. At the Conference of Paris in 1856 an amnesty clause was adopted by the Powers without discussion or dissent, and embodied in Article 5 of the Treaty of 30 March 1856, with the express provision that the amnesty 's'étendra aux sujets de chacune des parties belligérantes qui auraient continué pendant la guerre dans le service de l'un des autres belligérants'.[2] When on 18 September 1897 the preliminaries of peace were signed with Turkey by the Great Powers it was agreed that an amnesty clause should be included, and the treaty of peace signed on 4 December 1897 duly included one in Article 5.[3] Amnesty clauses were also contained in two of the Peace Treaties which concluded the Balkan war of 1912–13.[4] The omission of such a clause in the Treaty between Bulgaria, Greece, Roumania, Serbia, and Montenegro, signed at Bucharest on 10 August 1913, led to a dispute between Bulgaria and Greece over the repatriation of prisoners, which was only resolved by the agreement of the Greek Government to grant a complete amnesty in respect of all prisoners repatriated.[5] Amnesty clauses in peace treaties in the nineteenth century were not limited to Europe. For example, such clauses are to be found in

[1] Treaty of Kutschuk-Kaïnardji, 21 July 1774, Article 1: see Noradounghian, *Recueil d'actes internationaux de l'Empire Ottoman*, vol. i, pp. 319–34; Treaty of Jassy, 9 January 1792, Article 1, ibid., vol. ii, pp. 16–21; Treaty of Bucharest, 28 May 1812, Article 2, ibid., pp. 86–92; (the wording of this Article is particularly extensive since it provides that those subjects of both powers who have 'pris part aux opérations militaires, ou qui, de quelque manière que ce soit, ont agi contre les intérêts de leur souverain ou de leur pays . . . sont dégagés de toute responsabilité, et tous ceux qui rentreront dans leurs foyers jouiront, sous la protection des lois, de la même manière que leurs compatriotes de tous les droits qui leurs étaient acquis auparavant'); Treaty of Adrianople of 14 September 1829, Article 13, ibid., pp. 166–73; and the Treaty of San Stefano of 3 March 1878, Article 27, ibid., vol. iii, pp. 509–21.

[2] See Martens, *Nouveau receuil*, vol. xv, p. 720, for the minute of the Conference, and Noradounghian, op. cit., vol. iii, pp. 76–79, for the text of the treaty.

[3] Noradounghian, op. cit., vol. iv, pp. 548–51, 553, 561. This article may, however, not have been wide enough in its wording ('. . . à toutes les personnes qui ont été compromises dans les évènements qui ont précédé ou suivi la déclaration de guerre') to include deserters.

[4] Turkey and Bulgaria, 29 September 1913, Article VI, and Turkey and Greece, 14 November, 1913, Article III. Martens, *Nouveau receuil* (3ème série), vol. viii, pp. 82, 94.

[5] The facts of this dispute are not quite clear, since few documents relating to it appear to have been made public. See Fauchille, op. cit., vol. ii, p. 198; and see *The Times*, 1 December 1913, p. 67, for the acceptance by the French President of the Bulgarian proposal that he should 'arbitrate on the difference between Bulgaria and Greece in connexion with the surrender of the Bulgarian prisoners still detained by Greece'. It would seem that these prisoners taken by the Greeks were volunteers with the Bulgarian forces whom the Greeks regarded as deserters, possibly because of different views as to their nationality and allegiance connected with territorial disputes between the two countries. See *The Times* of 18 February 1914, p. 7. The dispute was solved, diplomatic relations resumed, and all Greek prisoners in Bulgarian hands were repatriated after the Greek Government had declared an amnesty in terms wide enough to satisfy the Bulgarian Government. See Ministère des Affaires Étrangères (France), *Documents diplomatiques, Les Affaires Balkaniques*, vol. iii (Paris, 1922), pp. 108, 110. For the text of the treaty see Martens, *Nouveau recueil* (3ème série), vol. viii, p. 61.

a Treaty of 4 March 1857 between Britain and Persia[1] and in the Treaty of Shimonoseki between China and Japan of 17 April 1895.[2] In some cases amnesty provisions were limited to the inhabitants of specified territories, as, for example, in the Treaty of Peace between Russia and France signed at Tilsit on 7 July 1807. This provided, *inter alia*, for an amnesty in favour of individuals domiciled in the Polish territory which by the terms of the treaty was annexed by Russia and would thus extend to cases of repatriated Polish prisoners who, being also Russian subjects, had sided from motives of nationalism against Russia in the war.[3]

The inclusion of amnesty clauses was motivated by considerations of humanity. The modern practice of states shows that deserters from the enemy who have rendered service to a belligerent are normally excluded from the category of prisoners and therefore not repatriated. The same applies to the case of the deserter who has come over in response to an appeal to desert, and who is really in the same category, since he has rendered service by weakening his own side.[4] In such cases the motives are not only humanity and good faith but also the practical consideration that if such deserters are surrendered, this will have the effect of discouraging future desertions. According to United States practice a prisoner of war who enlists in the United States Army 'terminates his status as such' and cannot be returned to it, i.e. cannot be repatriated along with other prisoners, upon his discharge.[5] British practice during the Peninsular War is also illuminating. Large numbers of Napoleon's forces consisted of natives of

[1] Article IV, Martens, *Nouveau recueil*, vol. xvi, part 2, p. 114.

[2] Article IX, Martens, *Nouveau recueil* (2ème série), vol. xxi, p. 646. Both this and the latter clauses are unilateral, binding Persia and China only, respectively. Payrat, op. cit., p. 363, regards this provision of the Treaty of Shimonoseki as quite exceptional, but in view of the long history of such amnesty clauses his opinion cannot be sustained. Cf. also Article 6 of the Treaty of Peace between the United States and Spain of 10 December 1898, which provided for the release of 'all prisoners of war and all persons detained or imprisoned for political offences', and which the United States interpreted as even covering the case of a Spanish deserter recaptured by the Spanish forces when fighting with the insurrectionary forces in Cuba, and sentenced to life imprisonment by the Spanish authorities. See Magoon, *Reports on the Law of Civil Government in Territory Subject to Military Occupation by the Military Forces of the United States* (Washington, 1902), pp. 512–66, where the text of the Article is reprinted.

[3] See (F. de) Martens, *Recueils des traités et conventions conclus par la Russie avec les puissances étrangères*, vol. xiii, pp. 313–14. For a similar amnesty, limited to the inhabitants of Montevideo (which became independent by the terms of this treaty and is now Uruguay), see the Preliminary Treaty of Peace between the United Provinces of Río de la Plata and the Emperor of Brazil, 27 August 1828, Article 16, in *Tratados, convenciones, protocolos y demás actos internacionales vigentes celebrados por la República Argentina* (1901), vol. i, pp. 19–27.

[4] There is a great deal of controversy among writers on the question whether it is contrary to the laws of war to invite or induce desertions from one's enemy's forces. Among those who condemn the practice may be mentioned Bluntschli, Dudley Field, Fiore, Halleck, Klüber, Pradier-Fodéré, and Woolsey; those who approve include Heffter, G. F. de Martens, Pufendorf, Pillet, and Vattel. There is little doubt that it has been commonly practised by belligerents for centuries; cf. § 145 of Ch. xiv of the *Manual of Military Law*, Amendments (No. 12), June 1936, reprinted 1940.

[5] See U.S. War Department, *A Digest of Opinions of the Judge Advocate General of the Army* (1912), p. 1076, decisions of 13 July 1894 and 13 April 1895.

countries which he held in subjection and who had been unwillingly drafted to his colours. In Catalonia, for example, three-quarters of the army of France was said to consist of Germans and Italians, and elsewhere in the Peninsula numerous Prussians, Austrians, Dutch, Flemings, Poles, Swiss, and Russians had been impressed into the French army. Wellington from the outset saw the military potentialities of this situation. 'I consider it an object of the utmost importance to encourage the desertion of the enemy's troops', he wrote to Lord Liverpool (at that date Secretary of State for War and the Colonies) on 1 March 1810. At the same time Wellington authorized a bounty of 20 dollars to every deserter from the enemy who volunteered to enlist in the British forces.[1] His policy was not only to weaken the enemy by appealing to these foreign troops to desert, but to enlist them to fight for the cause of liberation on the British side. Several spirited leaflets addressed to these troops have been preserved—an early example of what would now be called political or psychological warfare. One of 23 August 1810 called on these troops to desert and enlist on the British side, and promised them personal safety: 'Ne craigniez pas la vengeance du Tyran, elle ne sçaurait vous atteindre. Les enfans toujours victorieux de la glorieuse Albion vous protégeront. . . .'[2]

Lord Liverpool, in reply to Wellington's dispatch quoted above, and to subsequent dispatches, wrote on 5 April 1810 refusing his consent 'for many and strong reasons' to the proposal for raising a corps out of deserters from the enemy, but at the same time stated that 'whatever measures your Lordship may see it expedient to adopt with a view of encouraging the Desertion of Foreign Soldiers from the enemy's Service . . . will meet the approbation of His Majesty's Government'.[3] In spite of an instruction to Wellington of 22 January 1812 that 'no Prisoners of War should be enlisted whatever may be their native country, and that no Frenchman should be enlisted even from among deserters',[4] it would seem that large numbers of these foreign soldiers, both deserters and those taken prisoner, were subsequently enlisted in British service.[5] For Lord Bathurst, Lord Liverpool's successor as Secretary of State for War, found it necessary to reiterate this instruction more than eighteen months later,[6] and it would seem that in the fluid conditions of early-nineteenth-century warfare,

[1] P.R.O., WO 1/243, p. 345.

[2] P.R.O., WO 1/261, p. 35. Cf. ibid., p. 597, for a similar leaflet dated 17 September 1811.

[3] P.R.O., WO 6/34, pp. 111–12.

[4] P.R.O., WO 6/166, pp. 60–61. The prohibition never applied to the Spaniards taken prisoner by the British from among those enlisted by the French after their occupation of Spain. These Spanish prisoners willingly enlisted with our forces in large numbers. See P.R.O., WO 1/227, pp. 1–46 (1810).

[5] P.R.O., WO 1/810, p. 141, of 2 November 1811, from the Transport Office to the Deputy Adjutant General.

[6] P.R.O., WO 6/166, p. 172, of 26 October 1813.

Wellington preferred to follow his own judgment, even with regard to prisoners of war. It may be observed that neither Lord Liverpool nor Lord Bathurst suggested at any time that the enlistment of deserters or prisoners was contrary to the usages of war. The prohibition against the enlistment of Frenchmen was due to the fact that 'the companies formed from deserters of that description have so much misconducted themselves'.[1] However, so far as foreign deserters, other than French, as opposed to prisoners of war were concerned, enlistment was always encouraged. Moreover, in order to stimulate desertion by those foreign soldiers who, while anxious to abandon the fight on Napoleon's side, were not anxious to resume it on the British side, Wellington was authorized by Lord Bathurst on 10 September 1812 to give such prospective deserters assurances that they would be safely conveyed to the shores of their own countries—where, no doubt, they could have every expectation of escaping Napoleon's vengeance.[2] It is of interest to note that Wellington had already been following this practice for over two years. 'Some deserters, Germans as well as of other nations', he wrote in a dispatch of 1 May 1810, 'have declined altogether to enlist into the King's Service, and these have been sent to England with a letter to the Commandant of the Depôt stating that I had promised means should be facilitated to them for their return to their own countries'.[3] The same dispatch reveals the care taken by Wellington that the deserters should not be recaptured by the French. It is, of course, inconceivable that any of these deserters, whether they enlisted or not, should have been mingled with the mass of prisoners of war and included in any cartel of exchange or repatriation with France. In this connexion an incident from the earlier wars with France is instructive. When on 6 October 1797 the French revolutionary authorities accused Britain of including in prisoner exchanges 'avec nos braves marins ceux des Français lâches ou perfides qui s'étaient enrôlés à sa solde sous les bannières des émigrés', the charge was indignantly repudiated by the Admiralty as 'highly unwarranted and unjustifiable'.[4]

Although what in the period following the Second World War would be called the 'ideological question' played some part, at any rate, in Wellington's appeals for desertion, the main motive underlying this distinctive treatment of deserters was recognition that they had done service to the cause of the side to which they had deserted. There are, however, some instances where refusal to repatriate deserters has been motivated by recognition of the fact that the war concerned had been fought on an issue of principle, and that desertion from one side to another was not a dishonourable action, but an act of faith. There were several such instances

[1] P.R.O., WO 6/166, p. 172, of 26 October 1813.
[2] P.R.O., WO 6/51, pp. 130–1.
[3] P.R.O., WO 1/244, p. 145.
[4] P.R.O., WO 1/906, pp. 437, 443.

in the wars of independence in Spanish America. When the Spanish commander, Morillo, was negotiating the armistice of 22 November 1820 with Bolívar, he proposed that deserters should be reciprocally exchanged 'since the principal basis of this Treaty is reciprocal good faith'. This proposal was rejected by Bolívar since it was 'contrary to the Constitution and laws of Colombia and contrary to all humane practice to surrender a man who has enlisted with our colours'.[1] The treaty signed on 26 November 1820 at Trujillo contains an unusual provision, namely, that deserters already recaptured shall not be put to death, and the reason given for this provision is illuminating: 'La guerre actuelle étant provenue d'une différence d'opinions, et les personnes qui ont combattu avec le plus d'acharnement pour les deux causes ayant entre elles des rapports étroits de parenté ou autres. . . .'[2] The following year Bolívar's commander, General Sucre, having agreed on an exchange of a hundred prisoners with the Spanish commander Aimerich, refused to go on with the arrangement when all the six hundred Spanish-American prisoners in his hands protested that they preferred captivity with the Republic to service with the King of Spain. 'It would be a cruelty', he writes in his dispatch, 'to expose to the fury of the Spaniards a hundred of the Americans who have manifested such noble sentiments'.[3] A parallel in European practice to this ideological motive for refusal to surrender deserters may be found in the Russo-Turkish wars of the eighteenth and nineteenth centuries. Russia, as the self-appointed champion and protector of the Orthodox faith in the Ottoman Empire, insisted on the insertion in the clauses providing for the repatriation of prisoners in her treaties of peace with Turkey of an exception in favour of those who had embraced the Christian religion and, reciprocally, of those Christians who had embraced the Moslem faith.[4]

III

The practice of belligerents in the course of the nineteenth century seems, as shown in the preceding section, to have recognized that the fate of the prisoners of war whom he repatriated after hostilities was, on grounds of humanity, a responsibility of the repatriating belligerent; that though deserters were often included in repatriation along with prisoners, their subsequent fate should be safeguarded by an amnesty; and that where deserters have rendered service, or have been given a promise, or where

[1] 'Que siendo contra la Constitución y las leyes de Colombia y contra toda institución humana volver un hombre que se acoge à las banderas. . . .' See Rodríguez Villa, *El Teniente General Don Pablo Morillo, Primo Conde de Cartagena, Marqués de la Puerta* (Madrid, 1908), vol. iv, pp. 302–9.

[2] Article 7, Martens, *Nouveau recueil*, vol. v, p. 541.

[3] *Recuerdos históricos del Coronel Manuel Antonio López* (Bogotá, 1878), pp. 43–44.

[4] See above, p. 314, n. 1, for references to the texts of these treaties. The relevant articles are: Treaty of Kutschuk-Kaïnardji, Article 25; Treaty of Jassy, Article 8; Treaty of Bucharest, Article 9; and Treaty of Adrianople, Article 14.

the ideological nature of the war might expose them to particular fury, it is permissible not to repatriate them at all. In spite of this, no reflection of this humane practice appeared in the deliberations of the First Peace Conference at The Hague in 1899 so far as they related to the repatriation of prisoners. The preliminary discussions at Brussels in 1874 accepted with slight modifications what was in substance the original Russian proposal: 'the exchange of prisoners of war is regulated by mutual agreement between the belligerents.'[1] At The Hague, in the laudable attempt to achieve the humane object of ensuring repatriation without the delay or hindrance occasioned by the necessity of a special agreement, the equally humane requirement that the unwilling prisoner should not be repatriated, at any rate without some guarantee for his safety where he had compromised himself in the eyes of his own state, was forgotten. Article 20 of Convention IV was proposed by M. Beernaert and accepted without discussion: 'After the conclusion of peace the repatriation of prisoners of war shall be carried out as quickly as possible.'[2] However, the fact that the provisions of the Convention adopted at The Hague in 1899 made no reference to the specific case of deserters does not appear to have affected the practice of belligerents. The fate of the repatriated prisoner of war still remained a matter of concern to the repatriating belligerent. The amnesties after the Balkan wars of 1912–13 have already been noted. The disposal of prisoners of war after the First World War was based squarely on the principle that the former enemies of the Allied and Associated Powers were not entitled to demand the repatriation of any prisoner of war whom the Allied and Associated Powers did not think it fit to repatriate. The Treaty of Versailles, after providing that repatriation shall be carried out as speedily as possible, states as follows: 'Prisoners of war or other German nationals who do not desire to be repatriated may be excluded from repatriation; but the Allied and Associated Governments reserve to themselves the right either to repatriate them or to take them to a neutral country, or to allow them to reside in their own territories.' In the event, however, of the repatriation of a prisoner against his will, such prisoner would be covered by the amnesty contained in the remainder of the Article: 'The German Government undertakes not to initiate any exceptional proceedings against these persons or their families nor take any repressive or vexatious measures of any kind whatsoever against them on this account.'[3]

[1] See *British and Foreign State Papers*, vol. 65, pp. 1085–9. Cf. the *Manual on the Laws of War on Land*, published by the Institute of International Law in 1880, Article 73: 'The captivity of prisoners of war ceases, as a matter of right, at the conclusion of peace; but their liberation is then regulated by agreement between the belligerents.' See J. B. Scott (ed.), *Resolutions of the Institute of International Law*, p. 39.

[2] See *The Proceedings of the Hague Peace Conference. Translations of the Official Texts. The Conference of 1899*, ed. J. B. Scott, pp. 57–58, 256, 482–3.

[3] Article 220. The same provisions are contained in Article 166 of the Treaty of Peace with

Under these provisions it was possible to ensure that all those Germans and Central Power nationals who had compromised themselves during the war in the eyes of their own state—whether by desertion in combat or by subsequent assistance to the Allied cause is immaterial—might either avoid repatriation or at any rate return under a guarantee of amnesty of which the Allied Powers had some prospect of ensuring the observance.

However, the Allied Powers at Versailles were not solely concerned with the reciprocal repatriation of their own prisoners of war and those of Germany and her Allies. No repatriation of Russian prisoners by Germany had taken place after the Peace Treaty of Brest-Litovsk of 3 March 1918—the chaos of civil war inside Russia would alone have made it impossible. At the time when the Peace Conference met there were still several hundred thousand Russian prisoners in German hands, for whose disposal the Allied Powers had to take at all events supervisory responsibility. A large proportion of these Russian prisoners were hostile to the Bolshevik revolution. They had no wish to return to Russia, where they would have to face repression for their political views or might find themselves forcibly enlisted into the Red Army to fight on the Bolshevik side in the civil war.[1] The Supreme War Council agreed in principle on 12 January 1919 that the Allied Powers should reserve to themselves the necessary rights and authority to send Russian prisoners elsewhere than across the lines into Russia, and on 14 May 1919 the Council of Foreign Ministers agreed that repatriation must be selective, that is to say, that non-Bolshevik prisoners should not be repatriated to areas of Russia which were dominated by the Bolsheviks.[2] There is no indication that this principle of 'voluntary repatriation' was ever challenged by the Soviet authorities. In the repatriation treaty of 19 April 1920 signed at Berlin between Germany and Russia, the Provisions of Article 1 were: 'Prisoners of war and interned civilians of both sides are to be repatriated in all cases where they themselves desire it.'[3] Shortly before, in a treaty of repatriation signed at Copenhagen on

Austria, *Treaty Series*, No. 11 (1919), Cmd. 400; in Article 150 of the Treaty of Peace with Hungary, *Treaty Series*, No. 10 (1920), Cmd. 896; and in Article 213 of the Treaty of Peace with Turkey of 10 August 1920, *Treaty Series*, No. 11 (1920), Cmd. 964.

[1] According to information available to the Supreme War Council, of a total of some 250,000 Russian prisoners in German internment in April 1919, some 50,000 did not wish to return to their homes in Russia. See Military Representatives' Report of 13 June 1919 printed in *Documents on British Foreign Policy 1919–1939*, First Series, vol. i, pp. 304–7. However, these figures may have been an underestimate. According to German figures based on the census of 8 October 1919, 'at least' 200,000 former Russian prisoners either remained in Germany or returned to Germany after repatriation to Russia. Two to three hundred German prisoners settled voluntarily in Siberia. See *Völkerrecht im Weltkrieg, Dritte Reihe im Werk des Untersuchungsausschusses, Dritter Band: Verletzungen des Kriegsgefangenenrechts, Zweiter Halbband* (1927), p. 713.

[2] See *Papers Relating to the Foreign Relations of the United States 1919. The Paris Peace Conference* (1942), vol. iii, pp. 472–3, 479, and vol. iv, pp. 706–9.

[3] *League of Nations Treaty Series*, vol. ii, pp. 66. Article 1 of the treaty signed the following day between Germany and Latvia is in identical terms: ibid., p. 72.

12 February 1920 Britain and Russia had agreed that repatriation of Russian combatant prisoners in the custody of the Archangel (anti-Bolshevik) Government should be limited to those prisoners 'whose release is desired by the Soviet Government and who themselves desire to leave the territory under the control of the Archangel Government'.[1]

At first sight it looks as if the Allied and Associated Powers, in making repatriation depend—in the case of the Russian prisoners entirely, and in the case of the German and other Central Power prisoners in part—on the wishes of the prisoner, were introducing a new principle into international practice. It is submitted that this is not so, and that there is no difference of principle between the refusal to repatriate the deserter and the refusal to repatriate the prisoner who says he does not want to go back. The frequent nineteenth-century practice of providing for amnesty is evidence of the recognition of a duty imposed on belligerents to ensure that prisoners whom they repatriate are not made to suffer in consequence of any action before or during captivity by which they may have compromised themselves in the eyes of their own state. In the case of the deserter, and particularly in the case of the deserter who has rendered service by enlisting with the belligerent to whom he has deserted or by embracing a faith or a political ideology to which his own state is opposed, there is the additional right recognized in practice to exclude him from the category of prisoner of war and therefore from repatriation. The repatriated prisoner comes once again immediately under the military discipline of his state upon repatriation: he is repatriated as a soldier, not as a civilian. This military discipline, though no doubt suspended in its operation, continues throughout the period of his captivity. A manifested refusal by him to be repatriated is therefore a repudiation of the military discipline to which he is still subject, and is in law no different from any other act of desertion. To repatriate such a prisoner by force is to repatriate a deserter, and this, except under safeguards, a belligerent is by established practice fully entitled to refuse to do. If no such safeguards exist, the belligerent may properly exclude such an individual from the category of prisoner and therefore from repatriation, whether during or at the end of hostilities. This applies with particular force where the refusal to return is founded on differences of ideology or political allegiance, since the prisoner is in effect in the position of one claiming political asylum. Such was the position of the Russian prisoners in German hands in 1919. An incident from British practice in 1797 suggests that the principle applied to them was not a new one. In that year, during the war with revolutionary France, a number of Frenchmen captured on privateers petitioned the Admiralty for their release, and adduced in support of their petition evidence that they were

[1] *League of Nations Treaty Series*, vol. i, p. 264.

hostile to the revolutionary government. The Treasurer of the Navy, Dundas (later Lord Melville) refused this request, partly because he was not satisfied with the evidence adduced of their political allegiance, and partly because 'it would tend to establish precedents which ought not to be made between subjects of France taken on board privateers and those taken in vessels in the service of the government of France'. But the conclusion of his memorandum on the subject shows that Dundas clearly recognized that if he acceded to the request there could be no question of ultimate exchange or repatriation. 'Persons to whom this indulgence might be shown could not return to France and would therefore be a burden on the country.'[1] Nor does he suggest that to grant this indulgence would be in any way contrary to the usages of war.

It remains to consider how far this position is affected where the Geneva Conventions on the Treatment of Prisoners of War of 27 July 1929 and 12 August 1949 apply.[2] Neither of these Conventions includes any provisions relating to amnesty, nor does either of them deal expressly with the case of the deserter. Both Conventions in substance impose a duty on signatories to repatriate prisoners of war—a duty which in any case is now established in customary law. The two Conventions differ from each other in three respects so far as the provisions relating to repatriation are concerned:

(*a*) By the earlier Convention prisoners of war are defined as persons in certain categories 'who are captured by the enemy' (Article 1). The later Convention, apart from extending the categories of persons, uses the words 'who have fallen into the power of the enemy' (Article 4).

(*b*) The earlier Convention provides for the inclusion 'normally' in armistice conventions of provisions for repatriation and adds: 'In any case the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace' (Article 75). The later Convention provides that 'Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities' (Article 118), i.e. whether or not a peace treaty has been signed.

(*c*) The later Convention contains a new provision which has no equivalent in the earlier: 'Prisoners of war may in no circumstances renounce in part or entirety the rights secured to them by the present Convention . . .' (Article 7).

The whole purport underlying the two Conventions is to ensure the humane treatment of prisoners. In the absence of express provisions

[1] P.R.O., WO 1/906, pp. 461 ff.; the memorandum is dated 25 November 1797.

[2] For the texts of these Conventions see *Treaty Series*, No. 37 of 1931, and *Miscellaneous*, No. 4 (1950), Cmd. 8033.

relating to deserters, it must be assumed on ordinary principles of interpretation that the intention was to leave the established practice relating to the repatriation of deserters unaffected.[1] It has been suggested that the difference in language in Articles 1 and 4 of the two Conventions respectively is intended to cover the case of surrenders.[2] The explanation seems perhaps somewhat specious since a soldier who surrenders is just as much 'captured' as any other prisoner and the two phrases seem to be identical in their effect. The distinction between a prisoner and a deserter does not usually arise at the moment when captivity begins, since the status of the two is in almost invariable practice assimilated. It most frequently arises at the moment of repatriation, when customary usage requires either that the belligerent shall ensure that deserters shall not be punished, or else permits their exclusion from the category of prisoner of war and therefore from repatriation. Indeed, the use in the later Convention of the words 'released and repatriated' would appear at any rate to exclude forcible repatriation of the unwilling prisoner, i.e. the deserter—since it is impossible to repatriate by force a man who has been 'released'. Finally, the provisions of Article 7 of the later Convention do not appear to affect repatriation. It is, in the first place, doubtful how far an injunction in a treaty addressed to individuals can have any validity in law.[3] But whatever its meaning, it would appear to be a violation of law, language, and sense to interpret it as validly prohibiting a prisoner from renouncing his 'right' of being forcibly repatriated.

In any war in which the ideological element enters, the appeal to the enemy's soldiers to desert is a powerful and lawful means of warfare, and belligerents are unlikely to forgo it in the future. According to common practice the status of such deserters will often be assimilated to that of prisoners during hostilities. However, to repatriate them against their will

[1] 'Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way'—fourth of the five principles for the interpretation of treaties formulated by M. Verzijl in his Award of 19 October 1928 in the case of *Georges Pinson* before the Franco-Mexican Mixed Claims Commission. See *Annual Digest*, 1927–8, Case No. 292, and *Revue générale de droit international public*, vol. xxxix (1932) at p. 653. Cf. Hudson, *The Permanent Court of International Justice, 1920–1942*, pp. 655–6, where several instances of the application of this principle by the Permanent Court of International Justice are cited.

[2] International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949. Analysis for the Use of National Red Cross Societies*, vol. ii, p. 18. This interpretation is officially sponsored by the International Committee, but seems to rest on a very slender basis. If correct it could be used to argue that the duty to repatriate under the Convention extends to all deserters without qualification—which certainly would run counter to the humane traditions of the Red Cross.

[3] Oppenheim, *International Law*, vol. ii (7th ed.), p. 396, n. 1, suggests that the effect in law is to forbid 'the parties to avail themselves of such renunciation'. The original draft of this Article was much clearer. It was addressed to the Parties and provided that prisoners might not be 'amenés par la contrainte ou tout autre moyen de pression à renoncer . . .', &c. See *Revue internationale de la Croix Rouge*, No. 361 (January 1949), p. 13.

at the end of hostilities would be both an act of bad faith and an act of inhumanity, and one which customary international law does not require of a belligerent.[1]

[1] In view of the silence of the Geneva Convention of 1949 on this important question, it is to be hoped that the revision of Chapter xiv of the *Manual of Military Law* now in progress will take into consideration the advisability of reasserting British practice more explicitly than in the present § 55 of the *Manual*.

CONSTITUTIONAL FORMS AND SOME LEGAL PROBLEMS OF INTERNATIONAL MILITARY COMMAND[1]

By MAJOR RICHARD R. BAXTER, B.A., LL.B.[2]

IT would be altogether inaccurate to suggest that international co-operation in military matters is of a recent origin. Unified command of the forces of several countries and collaboration in military undertakings are as old as alliances, and alliances are probably as old as war itself. But the history of agencies and instrumentalities for the co-ordination of the military efforts of allies probably dates from the establishment of the Supreme War Council and a unified command under Marshal Foch during the First World War.[3] The years which followed the outbreak of the Second World War have witnessed an extremely rapid and fluid development of international institutions designed to permit the most effective utilization of military forces furnished by the co-operating states. It is now possible to distinguish several typical forms which actual and projected international military co-operation has taken over this period and to chart the general course of their development. The creation of these institutions has been productive of a wide range of constitutional and legal problems.

I. *Constitutional development*

1. *The Combined Chiefs of Staff and unified commands during the Second World War*

As the result of decisions reached at the Arcadia Conference in January 1942, the British and United States Governments established the Combined Chiefs of Staff as a principal agency for combined military planning by the two countries.[4] When this group sat in Washington, as it normally did, it consisted of the United States Chiefs of Staff and representatives of their British counterparts. However, when the United States Chiefs of Staff were in London or attended the major war-time conferences,[5] it was possible to

[1] The following abbreviations, apart from those commonly used, appear in this article: *A.J.I.L.* = *American Journal of International Law; D.S.B.* = *United States Department of State Bulletin; E.A.S.* = *United States Executive Agreement Series; T.S.* = *United Kingdom Treaty Series; T.I.A.S.* = *United States Treaties and Other International Acts Series*; *U.N.T.S.* = *United Nations Treaty Series.*

[2] Of the Judge Advocate General's Corps, United States Army. The opinions expressed herein are those of the author.

[3] Eliot, 'Military Organization under the Atlantic Pact', in *Foreign Affairs*, 27 (1949), p. 642.

[4] Eisenhower, *Crusade in Europe* (N.Y. 1948), p. 27; Cline, *Washington Command Post: The Operations Division* (1951), in *United States Army in World War II*, p. 100.

[5] The statements issued at the conclusion of most of the principal war-time conferences alluded specifically to the participation of the Combined Chiefs of Staff. See Joint Statement by

bring together all of the principal members of the body. The Combined Chiefs were assisted by a number of combined international committees, having responsibilities in such varied areas as intelligence, staff planning, logistics, and civil affairs. Although the agency became charged with overall responsibility for the military planning of the United Nations, it never included more than United States and British representation. Co-ordination with other members of the United Nations was secured through consultation with representatives of their armed forces and through the body known as the 'Military Representatives of Associated Powers'.[1] That the Combined Chiefs of Staff, a body informal in its inception[2] and somewhat non-representative in character, should have succeeded as well as it did is largely attributable to the close collaboration of Great Britain and the United States and of their principal officials, to whom the Combined Chiefs in effect served as an integrated chiefs of staff organization.

Anglo-American co-operation in the strategic direction of the war had its counterpart in the field in unified international commands. The first of these, the ill-fated A.B.D.A. Command in the South-West Pacific under General Wavell, was a victim of the adverse fortunes of war.[3] Eventually, highly successful unified commands were established in the principal theatres of the war—in South-East Asia, the South-West Pacific, the Pacific, the Mediterranean, and in Europe. The Combined Chiefs of Staff exercised varying functions with respect to these, the United States being charged with principal responsibility in the Pacific and China and Great Britain with a similar function in the Near and Far East, excepting China. Over these areas, the Combined Chiefs of Staff exercised only general jurisdiction, but in the case of the Atlantic–European Area, direct strategic control was

Prime Minister Churchill and President Roosevelt, 24 August 1943 (following the Quebec Conference), in *D.S.B.*, 9 (1943), p. 121; Anglo-Soviet-American Communiqué, 1 November 1943 (following the Moscow Conference), in ibid. p. 307; Declaration by President Roosevelt, Generalissimo Chiang Kai-shek, and Prime Minister Churchill, 1 December 1943 (following the Cairo Conference), in ibid., p. 393; Declaration of the Three Powers, 1 December 1943 (following the Teheran Conference), in ibid., p. 409.

[1] Cline, op. cit., pp. 101–3.

[2] The Combined Chiefs of Staff were established and held their first meeting in Washington in January 1942, but their Charter was not approved by the President of the United States until April of that year and apparently never received the formal approval of the Prime Minister (Cline, op. cit., p. 101, n. 34).

[3] The initials A.B.D.A. referred to the American, British, Dutch, and Australian elements in the command. For a description of its organization and establishment, see Morison, *The Rising Sun in the Pacific: 1931–April 1942* (1948), vol. iii of *History of United States Naval Operations in World War II*, pp. 271–9. The laboriously written directive to General Wavell is in striking contrast to later directives establishing the jurisdiction and functions of theatre commanders. General Eisenhower wrote of this directive:

> 'For the first time we had the concrete task of writing a charter for a supreme commander, a charter that would insure his authority in the field but still protect the fundamental interests of each participating nation. We found it necessary to go painstakingly into rights of appeal and scope of authority in operations and service organizations. Procedures to be followed if major differences should be encountered were a matter of concern. We had not yet come to appreciate fully the nature of an allied command.' (Op. cit., p. 29.)

vested in that body.[1] The directives from the Chiefs of Staff to the principal field commanders were terse and could hardly be called charters for the field commands. A typical one, designating General Eisenhower as Supreme Commander Allied Expeditionary Force, set forth his task, his command relationships, logistical responsibilities for his forces, and his relationship to United Nations forces in other areas and included a schematic representation of the chain of command.[2] Reports of operations were in turn furnished to the Combined Chiefs.[3]

The combined commands in the field were unified only for operational purposes, and administrative and logistical support remained a national responsibility except as otherwise provided by specific arrangements. The essential military requirement of unity of command was fulfilled by the appointment of a single commander, assisted by a single staff, which was only incidentally representative of the nations furnishing forces to the command. The complete integration on the command level in the field contrasted with the structure of the Combined Chiefs of Staff, in which plans could be arrived at only through the unanimous decisions of the American Chiefs of Staff and the British Chiefs of Staff or, in the case of matters of high political and military import, by the President and the Prime Minister. Below the level of the theatre or major force in the field, the forces were national in character, unified with one another by reason of a combined command.

Military co-operation through the Combined Chiefs of Staff was paralleled in the economic realm in a number of combined boards, established to deal with various areas of economic and logistical planning and organized in much the same fashion as the Combined Chiefs.[4] They included the Combined Raw Materials Board, the Combined Shipping Adjustment Board, the Combined Production and Resources Board, the

[1] Cline, op. cit., pp. 101–2.

[2] Directive to Supreme Commander Allied Expeditionary Force, issued 12 February 1944, in *Report by the Supreme Commander to the Combined Chiefs of Staff on the Operations in Europe of the Allied Expeditionary Force, 6 June 1944 to 8 May 1945* (G.P.O., 1946), p. vi. Cf. Directive by the Prime Minister to the Supreme Allied Commander South-East Asia, 23 October 1943, in *Report to the Combined Chiefs of Staff by the Supreme Allied Commander South-East Asia 1943–1945* (H.M.S.O., 1951), p. 226, which is illustrative of the delegation of responsibility by the Combined Chiefs of Staff to the national chiefs of staff. Paragraph 1 of the directive states: '. . . you will be responsible to the British Chiefs of Staff whom the Combined Chiefs of Staff have authorised to exercise jurisdiction over all operational matters in your Command and to issue all directives to you.'

[3] In addition to the reports cited in the preceding note, see, e.g., *Report by the Supreme Allied Commander Mediterranean to the Combined Chiefs of Staff on the Operations in Southern France, August 1944* (G.P.O., 1946) and *Report by the Supreme Allied Commander Mediterranean to the Combined Chiefs of Staff on Greece, 12th December 1944 to 9th May 1945* (H.M.S.O., 1949).

[4] The typical board was made up of a representative of the British Government and a representative of the United States Government, each of ministerial rank, although its day-to-day activities were usually entrusted to the deputy of each. The board would be assisted by an executive officer and a combined secretariat and by a number of joint committees.

Combined Food Board, and the Combined Munitions Assignment Boards, only the last of which was under the control of the Combined Chiefs of Staff.[1] The Pacific War Council exercised certain advisory functions with respect to the war in the Pacific[2] but never assumed any great importance. But organs such as these were only incidentally concerned with the conduct of military operations.

2. *Occupation administrations*

Problems of occupation and the civil administration of occupied territory demanded new forms of international military co-operation. In Europe, the usual scheme of organization for the administration of occupied territory which was subject to the jurisdiction of more than one occupant was the Control Commission or Council. The first of these was that established in Italy in implementation of the Armistice with that country.[3] In composition and function, it showed itself to be an outgrowth of the existing unified command in Italy—in essence, a further staff agency within the established structure of the theatre of operations. The Supreme Allied Commander, Mediterranean, was its President, and its personnel were, in about equal numbers, British and American.[4] A somewhat more representative function was served by the Allied Control Commissions which were established in Bulgaria, Hungary, and Roumania to carry out the provisions of the armistice agreements with those countries.[5] The Armistice with Bulgaria, which is typical of the others, stated that the Commission was to function 'under the chairmanship of the representative of the Allied (Soviet) High Command, and with the participation of representatives of the United

[1] Rosen, *The Combined Boards of the Second World War: An Experiment in International Administration* (1951); Katz, 'A Case Study in International Organization', in *Harvard Business Review*, 25 (1946), p. 1.

[2] Sherwood, *Roosevelt and Hopkins: An Intimate History* (1948), pp. 515–16. The Pacific War Council was the political counterpart of the Military Representatives of the Associated Powers.

[3] Italian Military Armistice, 3 September 1943, *T.I.A.S.* 1604.

[4] 'Allied Control Commission for Italy', in *D.S.B.* 11 (1944), p. 137. For the most part, the practice later followed in Germany and Austria of having an incumbent from each occupying power filling each of the principal offices was not followed. However, the Political Section was headed by two vice-presidents, one English and one American. Important posts were filled by the United States by presidential appointment (*D.S.B.* 9 (1943), p. 379; ibid. 10 (1944), p. 573). See generally *United States and Italy, 1936–1946: Documentary Record* (Department of State Publication 2669, 1946), and Fisher, 'Allied Military Government in Italy', in *Annals of the American Society of Political and Social Science*, 267 (1950), p. 114.

[5] Armistice Agreement between the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and Bulgaria, 28 October 1944, *E.A.S.* 437; Armistice Agreement between the United States of America, the Union of Soviet Socialist Republics and the United Kingdom of Great Britain and Northern Ireland, and Hungary, 20 January 1945, *E.A.S.* 456; Armistice Agreement between the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and Roumania, 12 September 1944, *E.A.S.* 490. Section XI of the Protocol of the Proceedings of the Tripartite Conference of Berlin (Potsdam), 1 August 1945, announced agreement on a revision of the control procedures for the three countries (*D.S.B.* 13 (1945), p. 160).

States and the United Kingdom'.[1] Since the occupation of these three countries was conducted by one power, the Soviet Union, considerable difficulty was encountered by the British and American members in maintaining an effective part in the occupation, especially in securing free elections and other democratic freedoms.[2]

The two most significant control agencies in Europe were the outgrowth of the division of the countries concerned into occupation zones, administered respectively by the United Kingdom, the United States, the Soviet Union, and France. The Control Council in Germany was, by quadripartite agreement, charged with ensuring 'appropriate uniformity of action by the Commanders-in-Chief in their respective zones of occupation' and with reaching 'agreed decisions on the chief questions affecting Germany as a whole'.[3] The principle of four-power representation on the Control Council itself was also carried out in the Co-ordinating Committee and in the various divisions of the Control Staff, each of which had four heads.[4] A similar practice was followed in over one hundred committees, sub-committees, and working parties.[5] Prior to the breakdown of the control machinery in 1948, a considerable quantity of legislation affecting Germany as a whole had been enacted,[6] and the three years of international co-operation which it had secured could not be said to be without value. The control machinery in Austria, aside from terminological differences, bore a strong resemblance to that in Germany. The Allied Council consists of four High Commissioners, representing the four occupying powers. Subordinate to the Council is an Executive Committee of representatives of the four High Commissioners and a staff organized by divisions, each headed by four directors. The Allied Commission, as the whole structure was designated, had responsibility in matters affecting Austria as a whole, and in the absence of action by the Allied Council the High Commissioners were authorized to act separately.[7] A parallel form of organization was applied to the cities

[1] Paragraph 18.

[2] See 'U.S. Efforts to Secure Free Elections in Bulgaria', in *D.S.B.* 15 (1946), pp. 820–1, containing correspondence between the United States and Soviet members of the Commission. The activities of the three Control Commissions are summarized in *International Organization*, 1 (1947), pp. 163–5, 166–7.

[3] Statement by the Governments of the United States of America, Union of Soviet Socialist Republics, United Kingdom, and the Provisional Government of the French Republic on Control Machinery in Germany, 5 June 1945, in *D.S.B.* 12 (1945), p. 1054. See Jennings, 'Government in Commission', in this *Year Book*, 23 (1946), p. 112; Nobleman, 'Quadripartite Military Government Organization and Operations in Germany', in *A.J.I.L.* 41 (1947), p. 650.

[4] Paragraph 7, Statement on Control Machinery.

[5] Even the Allied Secretariat had four national elements (see Nobleman, loc. cit., p. 652).

[6] See *Enactments and Approved Papers of the Control Council and Coordinating Committee* (1945–8, 9 vols.).

[7] Agreement between the Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics, and the Government of the French Republic on the Machinery of Control in Austria, 28 June 1946, *T.S.* No. 49 (1946), *T.I.A.S.* 2097. The zones of occupation had been agreed upon at a meeting of the European Advisory Commission on

of Vienna, which was under zonal administration,[1] and Berlin, which was similarly divided.[2] An Allied *Kommandatura*, consisting of four military commandants, was the principal control agency in each case.

The distinctive characteristic of the Control Commissions or Councils was that they operated on the unanimity principle both in the Commission itself and in its subordinate bodies. Disagreements which could not be resolved would either lead to differing policies in the zones of occupation or would have to be referred to the powers concerned for negotiation by their political agencies. Although these collegiate military bodies did not exercise command over the occupying troops, they were nevertheless supervising functions which were initially the responsibility of the military.[3] Especially in the cases of Germany and Austria, they served the purpose of bringing about uniformity of administration in countries which had been arbitrarily carved into occupation zones. When the powers ultimately reached complete disagreement on their policies toward an occupied territory, the lines marking out occupation zones sometimes tended to become international borders.

A more complex structure of occupation administration was applied to Japan. At its summit was the Far Eastern Commission, sitting in Washington and composed of the representatives of eleven states concerned with the occupation of Japan.[4] The occupation was actually carried out in Japan by the Supreme Commander for the Allied Powers. He was assisted by the Allied Council for Japan, consisting of representatives of the British Commonwealth, the Soviet Union, China, and the United States, the function of which was to consult with and advise the Supreme Commander.[5] Although the Allied Council for Japan had the right to refer certain subjects of disagreement to the Far Eastern Commission, it was itself little more than a debating society.

9 July 1945 (Agreement between the Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic on Zones of Occupation in Austria and the Administration of the City of Vienna, *T.S.* No. 49 (1946), *T.I.A.S.* 1600).

[1] Article 13, Agreement on Control Machinery in Austria, 28 June 1946.

[2] See *United Nations, Official Records of the Security Council, Third Year, 363rd Meeting*, pp. 7–14.

[3] In time, the membership of the principal control organs and their subordinate agencies became very largely civilian rather than military. Specific provisions in this regard were made in Article 9 of the Agreement on Control Machinery in Austria.

[4] Terms of Reference of the Far Eastern Commission, in *Activities of the Far Eastern Commission* (Report by the Secretary General, 26 February 1946–10 July 1947; Department of State Publication 2888, 1947), p. 36. See also *Second Report by the Secretary General* (Department of State Publication 3420, 1949) and *Third Report by the Secretary General* (Department of State Publication 3945, 1950); Blakeslee, 'The Establishment of the Far Eastern Commission', in *International Organization*, 5 (1951), p. 499; Stratton, 'The Far Eastern Commission', ibid. 2 (1948), p. 1.

[5] Agreement of Foreign Ministers at Moscow on Establishing the Allied Commission for Japan, 27 December 1945, in *Occupation of Japan; Policy and Progress* (Department of State Publication 267, undated), p. 72.

The Far Eastern Commission formulated policy decisions, which were transmitted to the United States Government, which in turn prepared directives to the Supreme Commander in conformity with the policy decisions. Voting in the Commission was by a simple majority, provided the representatives of the four principal powers were included therein. The United States Government was authorized to issue 'interim directives' to the Supreme Commander if the matter was urgent and no existing policy decision of the Far Eastern Commission dealt with the matter.[1] Communication between the Commission and the Supreme Commander was thus always conducted through the United States Government. These relationships raised significant questions concerning the status of the Supreme Commander. His immediate subordination to the United States and not to the Far Eastern Commission is, on its surface, somewhat difficult to reconcile with assertions by him and by others that he was an 'international officer'.[2] In some respects, such as command of the occupation forces of several states and in the establishment by his own order of the International Military Tribunal for the Far East,[3] his functions appeared clearly international. The significance of this unusual pattern of organization for the development of international institutions probably lies in the fact that a single state, and with it its subordinate officers, should have been endowed with responsibilities of an international and, in a sense, representative character, going beyond purely national functions. It should be added that the status of the Supreme Commander for the Allied Powers was further complicated by the fact that he was also Commander in Chief, United States Army Forces, Pacific, and Commander in Chief, United Nations Command, in the Korean hostilities.[4] This threefold status inevitably occasioned complicated jurisdictional questions and problems of possible conflict of interest.[5]

In a number of instances military commanders administering occupied territory and commanding troops of international composition entered into agreements of an international character with the state in whose army they served or with a state whose interests they represented.[6] Even more

[1] Terms of Reference, Sections III and V.

[2] See General MacArthur's statement in *Hearings on the Military Situation in the Far East before the Committee on Armed Services and the Committee on Foreign Relations, United States Senate, 82nd Congress, 1st Session* (1951), part 1, p. 36; *In re Bush* (D.C. 1949), 84 F. Supp. 873. In the Terms of Reference of the Allied Council for Japan, he was referred to as the 'sole executive authority for the Allied Powers in Japan'.

[3] *T.I.A.S.* 1589. By contrast, the International Military Tribunal at Nuremberg was established by international agreement.

[4] See *Hearings* cited *supra*, n. 2.

[5] For example, a special Occupation Civil Court with Admiralty and Maritime Jurisdiction was established by General Orders No. 3 of the Supreme Commander, 1 February 1950, to deal with nine Chinese Nationalist vessels in Japanese ports on which mortgage payments to the United States were alleged to be in default (*The New York Times* newspaper, 12 February 1950, p. 8, col. 2).

[6] Agreement between the U.S.S.R. and the Supreme Commander for the Allied Powers in

frequently, zonal commanders concluded agreements with the governments of the areas they occupied.[1] The freedom with which such agreements were concluded suggest that the capacity to enter into international agreements is not as indicative of international personality as the Advisory Opinion of the International Court of Justice on *Reparation for Injuries Suffered in the Service of the United Nations*[2] might indicate.

Only on relatively rare occasions has the status of military commanders of this character been examined by the courts. In *Hirota* v. *MacArthur*,[3] the Supreme Court of the United States denied that it had jurisdiction to grant a writ of *habeas corpus* to a war criminal convicted by the International Military Tribunal for the Far East on the basis that the tribunal was an international one established by General MacArthur as 'agent of the Allied Powers'. *Habeas corpus* was similarly denied by a United States court to the war criminal Flick,[4] who had been tried by a United States military tribunal,[5] convened under United States military government legislation as authorized by Control Council Law No. 10. The Court considered the United States Military Tribunal to be an 'international court' because its power and jurisdiction stemmed from the Control Council in Germany. The facts that the Tribunal was exclusively a United States one, that the indictment was in the name of the United States, and that the proceedings were entirely within the control of the United States would appear, however, to outweigh the consideration that trials of this nature were authorized by Control Council legislation. The propriety of the opinion is resultingly open to considerable question.

3. *United Nations forces*

The Charter of the United Nations[6] envisaged that the Members of the

Japan (concerning repatriation of Japanese prisoners of war), 19 December 1946, in *D.S.B.* 23 (1950), p. 431; Economic Co-operation Agreement between the United States of America and the British/United States Zone, Free Territory of Trieste, 15 October 1948, *T.I.A.S.* 1845, signed on behalf of the British/United States Zone by 'the Commander, British/United States Forces'; Economic Co-operation Agreement between the United States of America and the United States and United Kingdom Occupied Areas in Germany, 14 July 1948, *T.I.A.S.* 1785, signed by the two zonal military governors on behalf of their respective zones and by the United States Political Adviser in Germany for the United States.

[1] E.g. Agreement between United States Forces in Austria and the Federal Government of Austria regarding Occupation Costs, 21 June 1947, *T.I.A.S.* 1921.

[2] *International Court of Justice, Reports of Judgments, Advisory Opinions and Orders*, 1949, p. 173 at p. 179.

[3] (1948), 338 U.S. 197. In a number of cases, United States military commissions convened by the Commanding General, Eighth United States Army, in Japan were considered to be 'international tribunals' (see, e.g., *In re Adachi*, Habeas Corpus No. 3562, U.S. District Court, D.C., 21 October 1949; *In re Norita*, Habeas Corpus No. 3558, U.S. District Court, D.C., 21 October 1949).

[4] *Flick* v. *Johnson et al.* (App. D.C. 1949), 174 F. 2d 983, cert. denied (1949) 338 U.S. 879.

[5] *United States* v. *Flick et al.* (1948), *Trials of War Criminals before the Nuernberg Military Tribunals*, vol. vi (1952).

[6] For an interesting instance of the creation of international forces by a commission of the

United Nations would undertake to make available forces which the Security Council might utilize for the maintenance of international peace and security.[1] The Military Staff Committee, established pursuant to Article 47, was to be 'responsible under the Security Council for the strategic direction of armed forces placed at the disposal of the Security Council'. Apparently it was contemplated that the Military Staff Committee, composed of the chiefs of staff of the permanent members of the Security Council or their representatives, would act as combined chiefs of staff to the Security Council, which would, in the event of enforcement action under Chapter VII, be responsible for that type of politico-military leadership exercised by the leaders of the principal powers of the United Nations during the Second World War. The failure of the Members of the United Nations to agree to make forces available on the call of the Security Council has rendered the deliberations of the Military Staff Committee on the structure of command of little more than academic interest.[2] The forces which are fighting under the aegis of the United Nations in Korea occupy a status for which it is difficult to find any explicit provision in the Charter. In view of the fundamental political differences which have made action by the Security Council virtually impossible, it is probable that any future military commands having a United Nations character will be constituted in conformity with the General Assembly's 'Uniting for Peace' Resolution.[3]

Immediately after the hostilities in Korea began, the Security Council recommended that members of the United Nations furnish assistance to the Republic of Korea in repelling the armed attack from the north. The resolutions of 25 and 27 June 1950[4] were followed by that of 7 July,[5] which recommended

> 'that all Members providing military forces and other assistance pursuant to the aforesaid Security Council resolutions make such forces and other assistance available to a unified command under the United States;'

and requested that the United States designate the commander of such forces and furnish it reports of the action taken under the unified command. The following day, the President of the United States designated General

League of Nations, see First Report by the Commission for the Administration of the Territory of Leticia, 3 September 1933, *League of Nations Official Journal*, 1934, pp. 21–25.

[1] Article 43.

[2] See General Principles Governing the Organization of the Armed Forces Made Available to the Security Council by Member Nations of the United Nations: Report by the Military Staff Committee, in *United Nations Yearbook*, 1946–7, pp. 424 ff.

[3] Resolution 377 (V), *United Nations General Assembly, Official Records, Fifth Session, Supplement No. 20* (U.N. Doc. A/1775), p. 10.

[4] U.N. Doc. S/1501, *United Nations Security Council, Official Records, Fifth Year, 473rd Meeting*, pp. 7, 13–14; U.N. Doc. S/1511, *United Nations Security Council, Official Records, Fifth Year, 474th Meeting*, p. 4.

[5] U.N. Doc. S/1588, text in *United Nations General Assembly, Official Records, Fifth Session, Supplement No. 2* (U.N. Doc. A/1361), p. 25.

Douglas MacArthur as 'Commanding General of the military forces which the members of the United Nations place under the unified command of the United States'.[1] The possible ambiguity of the term 'unified command of the United States', which might indicate that the Unified Command was a separate entity subordinate to the United States Government, has been resolved by subsequent practice, which clearly indicates that the Unified Command is the United States itself. The actual international field force, of which General MacArthur was the first Commander in Chief, is designated the 'United Nations Command'.

The hostilities in Korea have been conducted without military direction from the United Nations and its organs and with only indirect political guidance from that organization. Discussions in the Security Council and in the General Assembly of purported violations of the law of war, of the armistice negotiations, of prisoner of war repatriation, and of the relief of the civilian population in Korea have not led to *directives* to the Unified Command concerning the resolution of these matters. Formally established relationships between the Unified Command and the United Nations are for all practical purposes confined to the periodic reports furnished in accordance with the Security Council's request.[2] Although gratifying as a form of direct participation in the Korean action by a United Nations organ, the establishment of the United Nations Korean Reconstruction Agency as a subsidiary organ of the General Assembly with responsibilities for relief and rehabilitation[3] has posed the problem of working out its relationships with the Unified Command and the United Nations Command, themselves apparently not organs of the United Nations, and with other agencies in Korea.[4]

The United States in its character as the Unified Command has been required to enter into a number of international agreements. No fixed form of describing the rôle of that country runs through these documents. Agreements with several countries concerning the logistical support of their forces in Korea and related matters stated that they were concluded by the United States, 'the executive agent of the United Nations Forces in Korea'.[5]

[1] Statement by the President, 8 July 1950, in *United States Policy in the Korean Crisis* (Department of State Publication 3922, 1950), p. 67.

[2] They are periodically reprinted in *D.S.B.*

[3] Resolution 410 (V), *United Nations General Assembly, Official Records, Fifth Session, Supplement No. 20* (U.N. Doc. A/1775), p. 31.

[4] On 18 July 1951, the United States Department of State announced the conclusion of an agreement between the United States, in its capacity as the Unified Command, and *U.N.K.R.A.* concerning responsibility for relief and economic aid in Korea during hostilities and subsequent thereto (*D.S.B.* 25 (1951), p. 232). A United Nations Commission for the Unification and Rehabilitation of Korea was also placed in Korea (Resolution 376 (V), *United Nations General Assembly, Official Records, Fifth Session, Supplement No. 20* (U.N. Doc. A/1775), p. 9).

[5] Agreement between the Government of the United States of America and the Government of the Kingdom of Sweden Concerning Participation of a Swedish Red Cross Field Hospital in the United Nations Operations in Korea, *T.I.A.S.* 2268; Agreement between the Government of

However, the United States had never been made an 'agent' of the United Nations, and the designation is difficult to reconcile with the actual status of the United Nations Command, since it would appear to indicate that the state was acting as an agent for one of its subordinate forces in the field. Agreements on economic matters[1] have also been concluded by the United States with the Republic of Korea, and the more recent of these correctly states that one of the parties is 'the United States of America acting pursuant to the resolutions of the Security Council of the United Nations of July 7, 1950 and July 31, 1950 (hereinafter referred to as the Unified Command)'.

The military structure established pursuant to the Security Council's resolution of 7 July 1950 may thus be seen to have its summit in the United States as the Unified Command. Since the Unified Command was not created in the manner envisaged by Article 29 of the Charter, it is not an organ of the United Nations, and for the same reason the forces fighting in Korea lack that character. The 'recommendation' of the Security Council that the Members of the Organization assist the Republic of Korea in repelling the armed attack against it and that all the states providing forces and other assistance make them available to a unified command of itself imposed no duties and granted no authority, notwithstanding a reference in a later resolution of the Council to 'the responsibilities being carried out by the Unified Command on behalf of the Security Council'.[2]

In so far as purely military matters are concerned, the structure of command for the Korean action resembles that employed in the occupation of Japan.[3] In both cases, a single state was allowed to act in the name of an international organization, which did not, however, exercise any control over actual military operations. A commander appointed by that state in turn commanded national contingents made available to the international command. It must be observed that the states participating in the Korean action, which include non-members of the United Nations,[4] have

the United States of America and the Government of the Union of South Africa Concerning Participation of the Forces of the Union of South Africa in United Nations Operations in Korea, 24 June 1952, in *D.S.B.* 27 (1952), p. 106.

[1] Agreement between the Government of the United States and the Government of the Republic of Korea on Expenditures by United Nations Forces, 28 July 1950, in *D.S.B.* 23 (1950), p. 734; Economic Co-ordination Agreement between the United States and Korea, 24 May 1952, in *D.S.B.* 26 (1952), p. 943. In seeking investigation by the International Committee of the Red Cross of germ warfare charges, the Secretary of State of the United States made the request in the name of 'the United States Government as the Unified Command' (*D.S.B.* 26 (1952), p. 452).

[2] Security Council Resolution of 31 July 1950, U.N. Doc. S/1567, *United Nations Security Council, Official Records, Fifth Year, 479th Meeting*, p. 3.

[3] Until July 1952, when it was announced in the House of Commons that a deputy chief of staff representing the Commonwealth would be added to the staff of the Commander in Chief, United Nations Command (*Official Report*, 1 July 1952, vol. 503, col. 250), that staff had been composed entirely of United States officers.

[4] The forces of the Republic of Korea, which is not a member of the United Nations, were placed under the Unified Command by President Rhee on 15 July 1950 (*D.S.B.* 23 (1950), p. 206).

not themselves banded together in any form of international organization but rather have, by bilateral arrangements with the United States, placed elements of their forces under United States command. The resulting force, although endowed with the name and the flag of the United Nations,[1] cannot in strict law be said to comprise United Nations troops,[2] except if it is understood that the command takes its United Nations character only from its formation in conformity with recommendations of that Organization. So, similarly, the expression 'United Nations action' is, while an acceptable term of political terminology, somewhat misleading in a legal context[3] unless it is accepted as an element of its definition that it refers to action recommended as well as directed by the United Nations. These conclusions do not deny the international character of the action or the forces which carry it on nor suggest any impropriety in the Security Council's authorizing forces to act when it is precluded from calling upon any troops of its own. They do, however, logically entail that the acts of the Unified Command or the United Nations Command are not the acts of the United Nations itself.

This last point has considerable bearing upon the responsibilities imposed by the law of war. For a variety of purposes, it is necessary to ask what juridical person is responsible for the custody of prisoners of war, for the occupation of territory, and for compliance with the law of war in general. While these questions may more properly be considered in the context of the bearing of the law of war on international military commands, reference may be made here to the handling of two alleged violations of neutral rights during the Korean conflict. When the Soviet Foreign Minister called to the attention of the United States Ambassador in Moscow an aeroplane incident which had taken place off Korea, the Ambassador refused to receive his note of protest on the ground that, the action having been taken by United Nations forces, the protest should have been directed to the Security Council.[4] In view of the relationship which actually prevailed between that organ and the Unified Command, which involved no control by the former over the actions of the latter, it is difficult to see how the

The contention could be made that forces of a non-member are not, strictly speaking, subordinated to the United States as the Unified Command but to the United States in its sovereign capacity, since only Members of the United Nations were invited to furnish troops to the Unified Command. Even if this view were to be adopted, the distinction would appear to be without practical consequences. Italy, similarly a non-member of the United Nations, has furnished a non-military Red Cross hospital, which is serving both military and civilian patients in Korea (*D.S.B.* 25 (1951), p. 960).

[1] By the resolution of the Security Council of 7 July 1950.

[2] Kelsen, *Recent Trends in the Law of the United Nations* (1951), p. 940.

[3] Ibid., p. 937.

[4] *D.S.B.* 23 (1950), p. 454. The United States Representative in the General Assembly on 27 November 1950 suggested similarly that such complaints might more properly be brought to the attention of the Security Council (*United Nations General Assembly, Official Records, Fifth Session, First Committee, Summary Records of Meetings*, vol. i, p. 392).

Security Council could be said to have any responsibility under law for the matter, although it would not have been beyond its competence to consider the Soviet protest. On another occasion, when American forces serving in the United Nations Command violated the Soviet frontier, the United States quite properly reported the matter to the Security Council and expressed its readiness to pay damages.[1]

4. *The North Atlantic Treaty Organization*

During the short history of the North Atlantic Treaty Organization,[2] much emphasis has been placed on the question whether the organization is an exercise of the 'right of individual or collective self-defence' referred to in Article 51 of the United Nations Charter or a 'regional arrangement' within the meaning of Articles 52–54.[3] If a 'regional arrangement', N.A.T.O. would have been required to seek the authorization of the Security Council in order to take enforcement action and to keep the Council informed of its activities in the maintenance of international peace. It has generally been asserted that N.A.T.O. was not established to perform functions of this nature, as they are defined in Chapter VIII of the Charter, and that it is essentially a collective defence arrangement under Article 51,[4] a conclusion which would seem to be borne out by the failure of N.A.T.O. to report its activities to the Security Council. It is not necessarily inconsistent, however, to suggest that in so far as N.A.T.O. encourages economic collaboration or attempts to strengthen free institutions in conformity with Article 2 of the North Atlantic Treaty, it may also be assuming some of the attributes of a regional arrangement.[5] In implementation of this Article, the North Atlantic Council has in several of its sessions given consideration

[1] U.N. Doc. S/1856.

[2] Information concerning the details of the activities of the Organization and of S.H.A.P.E. has naturally not been released to the public. The communiqués and other important documents of the North Atlantic Council during its first nine sessions are reproduced in *The N.A.T.O. Handbook* and *Supplement to the N.A.T.O. Handbook* (1952), prepared by the N.A.T.O. Information Service. See *Atlantic Alliance* (1952), a report by a study group of the Royal Institute of International Affairs, for a lucid examination of the history and functioning of N.A.T.O.

[3] For conflicting views on this subject see Beckett, *The North Atlantic Treaty, The Brussels Treaty, and the Charter of the United Nations* (1950), pp. 14–18, 33–35, and Kelsen, 'Is the North Atlantic Treaty a Regional Arrangement?', in *A.J.I.L.* 45 (1951), p. 162.

[4] During the debate in the House of Commons, Mr. Bevin called the North Atlantic Treaty (*T.S.* No. 56 (1949); *T.I.A.S.* 1964) an 'arrangement between certain states for collective self-defence as foreseen by Article 51 of the Charter' (*Official Report*, 12 May 1949, vol. 464, col. 2018). A similar statement was made by Mr. Acheson, the American Secretary of State, during his testimony before a Senate Committee (*Hearings before the Committee on Foreign Relations, United States Senate, 81st Congress, 1st Session* (1949), Part I, p. 31). See Heindel, Kalijarvi, and Wilcox, 'The North Atlantic Treaty in the United States Senate', in *A.J.I.L.* 43 (1949), p. 633, especially at pp. 637–40.

[5] This view was advanced by Ambassador Austin in his testimony before the Senate Committee on Foreign Relations (*Hearings, supra*, at p. 94; see Kelsen, *Recent Trends in the Law of the United Nations* (1951), pp. 920–5).

to co-operation within N.A.T.O. on economic, social, and cultural matters.[1]

The measures which have been taken by the signatories to the Treaty to integrate their means of defence go beyond the joint military planning which has characterized military alliances in the past. In addition to creating an international military command, its members have established organs of political consultation and of economic planning and co-ordination for war, without which the unification of military command cannot be fully effective. A constitution was wisely not framed for the Organization, and the resulting freedom to create and dissolve agencies through which N.A.T.O. works has permitted their development on a highly pragmatic basis. This *modus operandi* may form a useful precedent for international organizations in other fields. The North Atlantic Council, the only body created by the Treaty,[2] has taken full advantage of its autonomy, to such an extent indeed that the institutions of N.A.T.O. today differ in marked degree from the scheme of organization which was announced only three years ago.[3] The Council, the principal organ of N.A.T.O., is composed of the ministers for foreign affairs, finance, economics, and defence of the member states. Since the Council itself meets only from time to time as consultations become necessary, a Council of Permanent Representatives, deputies to the representatives serving on the Council, has been established to sit in continuous session.[4] Assisting the Council at its headquarters is an international secretariat and clustered about it functionally are a number of boards such as the Petroleum Planning Committee and the Planning Board for Ocean Shipping,[5] which bear a strong analogy to the combined boards of the Second World War. The chiefs of staff of the member nations and their representatives make up the Military Committee of the Council, which gives guidance on general military policy to the Standing Group and advises the Council on military matters.[6]

The actual command structure of N.A.T.O. begins, however, with the Standing Group, which is responsible for the 'higher strategic direction' of N.A.T.O. forces.[7] Like the Combined Chiefs of Staff established by Great Britain and the United States, this body is small and non-representative,

[1] Communiqué, Eighth Session, North Atlantic Council, 28 November 1951, in *N.A.T.O. Handbook* (1952), p. 63; Resolution on Implementation of Article 2 of the North Atlantic Treaty, adopted by the North Atlantic Council on 17 December 1952, in *D.S.B.* 28 (1953), p. 4.

[2] Article 9, North Atlantic Treaty.

[3] By the Communiqués following the First Session (17 September 1949) and Second Session (18 November 1949) of the North Atlantic Council, in *N.A.T.O. Handbook* (1952), pp. 39, 46.

[4] Press Communiqué on N.A.T.O. Reorganization, 3 May 1951, in ibid., p. 57, and Final Communiqué, Ninth Session, North Atlantic Council, 25 February 1952, in *Supplement to N.A.T.O. Handbook* (1952), p. 26.

[5] Communiqué, Fourth Session, North Atlantic Council, 18 May 1950, in *N.A.T.O. Handbook* (1952), p. 50.

[6] Ibid., p. 27.

[7] Communiqué, Fifth Session, North Atlantic Council, 26 September 1950, in ibid., p. 54.

comprising three officers who represent the chiefs of staff of the United Kingdom, the United States, and France. In December 1950 a Military Representatives Committee, analogous to the body known as the Military Representatives of the Associated Powers, was created to give representation to the other members of N.A.T.O. in the military planning of the alliance.[1] The two principal field commanders are the Supreme Allied Commander, Europe, whose headquarters near Paris is popularly known as S.H.A.P.E., and the Supreme Allied Commander, Atlantic, with headquarters at Norfolk, Virginia.[2] Although the Supreme Allied Commander, Europe, ordinarily receives instructions from the Standing Group, he is also authorized to communicate directly with national chiefs of staff and even, in exceptional circumstances, with national ministers of defence and heads of governments.[3] His staff is international in composition, but the principle of direct national representation is preserved by the presence in his headquarters of national military representatives.[4] The 'integrated force' which the Supreme Allied Commander, Europe, commands is divided into Allied Forces, Northern Europe, Southern Europe, and Central Europe, the first two of which are headed by a subordinate Commander in Chief and are further broken down into separate air, sea, and land commands.[5] Besides the two principal commands, one for Europe and one for the Atlantic, a number of other agencies, such as the N.A.T.O. Defence College and the Military Agency for Standardization, are responsible to the Standing Group, having much the same relationship to it as certain combined agencies had to the Combined Chiefs of Staff. The whole structure shows a considerable debt to lessons learned from the war-time co-operation of the United Kingdom and the United States.

In the economic and political spheres, N.A.T.O. has had a remarkable history of international co-operation, achieved without any formal surrender of sovereignty by the member states.[6] Voluntary action, stimulated by the efforts of the Supreme Allied Commander, Europe, and his staff to provide combat-worthy forces in Europe, has been the basis for raising fifty divisions within the original N.A.T.O. countries and for the extension of military

[1] See *N.A.T.O. Handbook* (1952), p. 27.

[2] The North Atlantic Treaty nations requested the appointment of a United States officer, and Admiral McCormick was designated by the President to fill this post (*D.S.B.* 26 (1952), p. 248). In the case of the appointment of the first Supreme Allied Commander, Europe, the North Atlantic Council requested General Eisenhower by name (Communiqué, Sixth Session, North Atlantic Council, 19 December 1950, in *N.A.T.O. Handbook* (1952), p. 56).

[3] Ibid., p. 29.

[4] Communiqué, Sixth Session, North Atlantic Council, 19 December 1950, in ibid., p. 56, and see ibid., p. 27.

[5] *Annual Report to the Standing Group, North Atlantic Treaty Organization from General Dwight D. Eisenhower, Supreme Allied Commander, Europe*, 2 April 1952, pp. 14–15.

[6] *Atlantic Alliance* (1952), pp. 42–43; Spofford, 'N.A.T.O.'s Growing Pains', in *Foreign Affairs*, 31 (1952), p. 96.

terms of service.[1] It is actually only in the command of troops that the members of the Organization have relinquished any of their sovereignty. In time of peace, the responsibility of the Supreme Commander is primarily for the organization and training of N.A.T.O. forces; in time of war, it must extend to full operational control.

Real internationalization and integration of forces exists only to a limited extent, however. The Organization itself, it is true, operates under an international budget.[2] The Headquarters Protocol, which has not yet come into force, will recognize that each Supreme Headquarters, which is supported by international funds, possesses juridical personality,[3] but this attribute is solely that of the headquarters and not of the troops subordinate to it or of the N.A.T.O. forces as a whole. A system of cost-sharing for the programme of airfields, communications facilities, and headquarters sites, known in the terminology of the Organization as 'infra-structure', has been worked out.[4] Certain common activities, such as the N.A.T.O. Defence College, have been established. On the other hand, N.A.T.O. troops are still national troops, raised, supplied, and administered on a national basis and possessing no more legal homogeneity than did similar troops during the Second World War. As long as the members of N.A.T.O. preserve their political and military identity, bilateral or multilateral agreements within N.A.T.O. must be employed to govern the status of troops, facilities, and equipment of one country which are placed in the territory of, or are made available to, another. A Status of Forces Agreement[5] and a Headquarters Protocol[6] adapting its provisions to the particular problems of international military headquarters have been concluded by the original members of N.A.T.O. but have not yet come into force. If forces of one country are to utilize facilities and areas in the territory of another, a military rights agreement, of which a number already exist, must be concluded between them.[7] Procurement activities by one country in another[8] will require co-ordination of logistical planning and agreement concerning the procedures to be followed in such procurement. Tax agreements must be concluded

[1] *Annual Report of the Supreme Allied Commander, Europe* (cited *supra*), pp. 17, 27, 33.

[2] See *N.A.T.O. Handbook* (1952), p. 23.

[3] Article 10, Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, 28 August 1952.

[4] Communiqué, Seventh Session, North Atlantic Council, 20 September 1951, in *N.A.T.O. Handbook* (1952), p. 60. These expenditures do not, however, bulk large when compared with the other defence expenditures of N.A.T.O. nations (Spofford, loc. cit., p. 97).

[5] Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 June 1951, Misc. No. 5 (1951), U.S. Senate Doc. Executive T, 82d Congress, 2d Session (1952).

[6] Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty, 28 August 1952.

[7] See p. 349, *infra*.

[8] See Ambassador Draper's remarks concerning the offshore procurement programme, with particular emphasis on airplanes and ammunition, in his report as United States Special Representative in Europe (*Report to the President*, 27 August 1952, pp. 8–12).

so that the revenue of one state will not be enhanced at the expense of the treasury of the other.[1] The United States has enacted legislation to deal with the furnishing of military assistance to foreign countries, particularly to N.A.T.O. and its members, and the provisions of these acts require the conclusion of agreements with the nations concerned.[2] The resolution of the legal problems which these activities entail is requisite to the successful organization of N.A.T.O. forces in time of peace. They arise from the fact that the N.A.T.O. military structure, like international commands of the past, displays integration of substantial magnitude in its supreme command but is characterized by diversity and the preservation of national identities in the national forces which comprise it.

5. *The European Defence Community*

Not until the coming into force of the Treaty Constituting the European Defence Community[3] will there exist truly integrated international forces—integrated administratively and logistically as well as in command.[4] Paradoxically, what now is a bold experiment in defensive measures may in time become once more virtually indistinguishable from a national army, if a real federation is attained by Germany, France, Italy, Belgium, the Netherlands, and Luxembourg. Nevertheless, as viewed today, the Community[5] and the European Defence Forces are significant departures from the international military organizations which have preceded them.

The most important institution of the Community will be the Commissariat,[6] which will act as a supra-national ministry of defence. Its nine members, although appointed by the members of the E.D.C., are to be supra-national officials, not responsible to or directed by the member nations.[7] The responsibilities of the Commissariat are to be 'executive and supervisory', including such matters as the preparation of the budget of the Community, the preparation of 'the common armament, equipment, supply, and infra-structure programmes' of the European Defence Forces, the granting of licences for military production, and the organization and the deployment of the Forces.[8] The Common Assembly, which is the Assembly of the European Coal and Steel Community with certain additional representation, will perform the limited role in military matters of receiving the reports of the Commissariat and of forcing the resignation of the

[1] See p. 351, *infra*. [2] See p. 352, *infra*.

[3] The texts of the Treaty and the annexed Protocols appear in *Conventions on Relations with the Federal Republic of Germany and a Protocol to the North Atlantic Treaty*, U.S. Senate Doc. Executives Q and R, 82d Congress, 2d Session (1952), pp. 167 ff.

[4] On the background of the E.D.C., see Oliver, 'The Cooperative Defense of Europe', in *Minnesota Law Review*, 36 (1952), p. 795.

[5] The Community is to have juridical personality, including the necessary juridical capacity in international relations (Article 7, Treaty). [6] Title II, Chapter I, Treaty.

[7] Article 20, Treaty. [8] Articles 19, 87, 101, 107, 71, and 77, Treaty.

Commissariat by vote of censure, if the occasion therefor should arise.[1] A Council of Ministers, comprising representatives of the member states, is charged with the function of issuing directives to the Commissariat and of harmonizing the 'actions of the Commissariat with the policies of the Governments of the member States'.[2] Since the members of the E.D.C. will remain sovereign states, it was inevitable and by no means inconsistent with the purpose of the Community that the ultimate control of the agencies created should, in the same manner as in international forces previously constituted, rest in representatives of the member states rather than in some supra-national organ.[3] Indeed, if the community, once established, is successful, its most striking accomplishment will have been reconciling a supra-national army with the preservation of national political identities.

The European Defence Forces themselves will be a homogeneous body, consisting of conscripts and professional soldiers, wearing a common uniform, subject to a common code of discipline, and owing allegiance and obedience to the Community.[4] Because of the diverse origins of the personnel of the forces, they are to be organized into basic units of common national origin, which are then to be brought together in army corps consisting of various national elements.[5] In the case of land forces the basic unit, composed of persons of the same nationality, will be the 'groupement' of approximately divisional size.[6] The process of creating this force must be a gradual one, and provision is made for a transitional administration of national contingents, which will eventually give way to a system of troop commands, supported by a system of European Territorial Military Regions.[7] When the European Defence Forces are ready for use, they are to be at the disposal of the Supreme Allied Commander, Europe, like other forces serving under him, and he is to submit to the Commissariat his requirements for the deployment of the Forces.[8] In time of war, the Supreme Commander will assume 'the full powers and responsibilities' conferred on him by his terms of reference.[9]

The forces thus constituted are designed to take the place of national troops, the maintenance of which, with certain exceptions, is prohibited.[10] National armed forces, other than police and *gendarmerie*, may be maintained only for the defence of non-European territory or for the performance of international missions, including those arising out of decisions of

[1] Article 36, Treaty. The more important aspect of the Assembly's work is the making of studies and proposals concerning further steps toward European unity (Trempont, 'Le Traité instituant la Communauté européenne de défense', in *International and Comparative Law Quarterly*, 40 (1952), pp. 526–7).

[2] Article 39, Treaty.

[3] See Trempont, loc. cit., p. 523.

[4] Article 15, Treaty, Articles 15–18, Military Protocol.

[5] Article 68, Treaty.

[6] Article 1, Military Protocol.

[7] Articles 6–10, Military Protocol.

[8] Articles 18 and 77, Treaty.

[9] Article 18, paragraph 2, Treaty.

[10] Article 9, Treaty.

the United Nations.[1] In case of internal disorders in the member states, the nation concerned may obtain release of a portion of its contingent with the permission of the Commissariat.[2] However, if troops are to be withdrawn from the European Defence Forces for the defence of non-European territory or for the performance of an international mission, the permission of the Supreme Allied Commander, Europe, must be obtained.[3]

New treaty relationships have had to be worked out, since the projected E.D.C. will be made up of only part of the membership of N.A.T.O. and will in addition include Germany, which lacks full competence in international affairs and is not a member of N.A.T.O.[4] A Protocol to the North Atlantic Treaty in effect extends its protection to Germany by providing that an attack on the territory of any of the members of the E.D.C. in Europe or on the forces of the E.D.C. is to be considered an attack on all the parties to the North Atlantic Treaty, within the meaning of Article 5 thereof.[5] In a Tripartite Declaration, signed on 27 May 1952, both the United Kingdom and the United States stated that a threat to the integrity or unity of the Community would be regarded as a threat to their own security.[6] At the same time, the United Kingdom and the member states of the E.D.C. agreed that each would give aid to the other in the event of an attack on the signatory states or their forces in Europe.[7] It may be anticipated that the existence of two international commands of differing composition will continue to cause complications of a military as well as a political nature, which will be alleviated to a certain extent only at such time as Germany may become a member of N.A.T.O. Typical of such questions would be the political problem and the problem of command which would arise in the event of the E.D.C. being committed to a military action not supported by the other members of N.A.T.O.[8]

If the Community is constituted, the progressive development of international military institutions through the increasingly integrated forms which have been noted will have reached its logical conclusion. Although

[1] Articles 10 and 11, Treaty.

[2] Article 12, Treaty.

[3] Articles 13 and 14, Treaty.

[4] The United Kingdom, the United States, and France retain their rights relating to the stationing of forces in Germany and the protection of their security in Berlin and Germany as a whole, including the unification of Germany and a peace settlement (Article 2, Convention on Relations Between the Three Powers and the Federal Republic of Germany, text in U.S. Senate Document cited *supra*, p. 341, n. 3, at p. 9; see Kunz, 'The Contractual Agreements with the Federal Republic of Germany', in *A.J.I.L.* 47 (1953), p. 106).

[5] Protocol to the North Atlantic Treaty on Guarantees Given by the Parties to the North Atlantic Treaty to the Members of the European Defence Community, 27 May 1952, Misc. No. 9 (1952), Cmd. 8562.

[6] Text in U.S. Senate Document cited *supra*, p. 341, n. 3, at p. 253.

[7] Treaty between the United Kingdom and the Member States of the European Defence Community, Misc. No. 9 (1952), Cmd. 8562. It extended the guarantees against aggression of the Brussels Treaty, *T.S.* No. 1 (1949), to the E.D.C. members.

[8] Nash, 'The European Defense Force and State Sovereignty', in *Proceedings of the American Society of International Law*, 1952, p. 141.

the constitutional development of such institutions is still in progress, some of the lessons which have been learned thus far may be summarized:

1. Unity of command in the field is essential.
2. The national chiefs of staff system can be applied effectively to international military organizations.
3. An international organization which is incapable of carrying on military operations itself may use the technique of designating a single state to act in a representative capacity for it and to command national contingents made available for an international purpose.
4. The administration of occupied territory through control councils consisting of the principal military commanders is a usable but not altogether satisfactory technique of military occupation.
5. Economic and logistical planning must supplement co-operation in the purely military and operational sphere.
6. An organ must be provided to give political guidance to any international military command.

II. *Legal problems in time of peace*

The mere act of placing national armed forces under the command of a foreign military commander is productive of relatively few legal problems.[1] The responsibilities of the international commander and of his national subordinate must be distinguished. It is usually stipulated that only operational control of the forces will pass to the international commander, while the forces remain subject to national administration and jurisdiction. This distinction may be further amplified in the establishment of the chain of command and channels of communication. If the state furnishing the larger number of troops is to furnish supplies and facilities to a national contingent, the agreement must specify the conditions under which the logistical support is to be furnished and reimbursement made.[2] Agreements of this nature in essence define the relationships of the two forces.

Far more complex and difficult legal questions are presented if arrange-

[1] Typical examples are the Agreement between the Government of the United Kingdom and the Royal Norwegian Government relating to the Participation of a Norwegian Brigade Group in the Occupation of the British Zone of Germany, 5 June 1947, *T.S.* No. 72 (1947), as extended by *T.S.* No. 8 (1949) and *T.S.* No. 61 (1951); Agreement between the Government of the United Kingdom and the Danish Government regarding the Participation of a Danish Contingent in the Occupation of the British Zone of Germany, 22 April 1947, *T.S.* No. 52 (1947), *U.N.T.S.* I, 110, and see *T.S.* No. 60 (1951); Agreement between the Government of the United States of America and the Government of the Kingdom of Sweden concerning participation of a Swedish Red Cross Hospital in the United Nations Operations in Korea, 27 June 1951, *T.I.A.S.* 2268; and the similar Agreement with Norway, 17 September 1951, *T.I.A.S.* 2325.

[2] See Articles 9 and 10 of the Agreement between the United Kingdom and Denmark, cited in the preceding note, and Agreement between the Government of the United States of America and the Government of the Union of South Africa concerning Participation of the Forces of the Union of South Africa in the United Nations Operations in Korea, 24 June 1952, in *D.S.B.* 27 (1952), p. 106.

ments are to be made for the presence in a foreign state of national contingents of an international command. Agreement must be reached between the 'sending state' and 'receiving state' concerning the status of the forces of the former in the territory of the latter, since the international law applicable to such forces is neither sufficiently definite nor sufficiently detailed. The parties to the North Atlantic Treaty have concluded such an agreement,[1] but it has not yet come into force.[2] It will require significant changes in the domestic legislation of the N.A.T.O. countries.[3] Similar status of forces provisions are to be found in the Treaty Constituting the E.D.C. and its Protocols[4] and in the Contractual Agreements with Germany, especially the Convention on the Rights and Obligations of the Forces.[5] Upon the completion of the defence structure for Europe and the North Atlantic, three régimes will thus be applicable to the forces—one for E.D.C., another for N.A.T.O., and a third for Germany. The E.D.C. agreements will govern the status of its forces as between E.D.C. members, while it is probable that the N.A.T.O. Status of Forces Agreement will be applied to non-members of the E.D.C. within N.A.T.O. and to the problems which arise in connexion with the stationing of E.D.C. troops in non-E.D.C. territory and non-E.D.C. troops in E.D.C. territory. Some adjustment of either the E.D.C. agreements or the N.A.T.O. Status Agreement will be necessary in order to give the E.D.C. a status analogous to that of a 'sending state' or 'receiving state'[6] within N.A.T.O. As Germany is not a member of N.A.T.O., United States and British troops will continue to benefit from the Contractual Agreements, while, with the exception of certain transitional provisions, French troops in Germany will be subject to the E.D.C. régime.[7]

[1] Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces, 19 June 1951, Misc. No. 5 (1951), U.S. Senate Doc. Executive T, 82nd Congress, 1st Session (1952). The N.A.T.O. Agreement is heavily indebted to the Agreement relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers, 21 December 1949, Misc. No. 1 (1950). See notes in *Modern Law Review*, 16 (1953), p. 59, and *Harvard Law Review*, 65 (1952), p. 1072.

[2] By the end of 1952, only France had deposited its instrument of ratification.

[3] Although the Visiting Forces Act, 1952 (15 & 16 Geo. VI and 1 Eliz. II, c. 67) does not refer to the N.A.T.O. Status of Forces Agreement and is general in its application to foreign forces in Great Britain, its enactment is a direct consequence of the adoption of the N.A.T.O. Agreement. During the debate on this Act in the House of Commons, it was indicated that implementing legislation might be necessary in the United States with respect to entry procedures (Article III), jurisdiction over criminal offences (Article VII), claims (Article VIII), and customs exemptions (Article XI) (*Official Report*, 27 October 1952, vol. 505, cols. 1599–1600). See also the Canadian Visiting Forces (North Atlantic Treaty) Act (15 & 16 Geo. VI, c. 28).

[4] Texts in *Conventions on Relations with the Federal Republic of Germany and a Protocol to the North Atlantic Treaty*, U.S. Senate Doc. Executives Q and R, 82d Congress, 2d Session (1952), pp. 167 ff.

[5] Texts in publication cited in preceding note.

[6] As defined in sub-paragraphs 1 (*d*) and 1 (*e*) of Article I of the N.A.T.O. Status of Forces Agreement.

[7] Article 50, Convention on the Rights and Obligations of Foreign Forces and their Members in the Federal Republic of Germany and Annex C thereto.

Recent agreements concerning the status of forces, of which the N.A.T.O. Agreement is typical,[1] differentiate three classes of persons: the members of the forces, the members of the 'civilian component', who are civilians employed by the armed forces, and dependents who are close relatives of persons in the foregoing categories.[2] Varying privileges, immunities, and responsibilities attach to the three groups. The vexing jurisdictional question which exists when crimes are committed by foreign forces in the receiving state[3] has been resolved in the N.A.T.O. Status of Forces Agreement by a formula which gives primary importance to the person or state against whom the offence was committed and to the status of the accused at the time.[4] Exclusive jurisdiction is granted to one of the two states concerned only as to offences, including those against the security of the state, which are punishable by its law but not by that of the other. The sending state has primary jurisdiction over those offences committed by members of the forces or of the civilian component which are 'solely against the property or security of that State', or 'solely against the person or property of another member of the force or civilian component of that State or of a dependent' or which arise 'out of any act or omission done in the performance of official duty'. Primary jurisdiction over all other offences rests in the receiving state. Other paragraphs provide for co-operation in investigations, the rendition of accused, and the procurement of evidence and witnesses; the policing of camps; and domestic legislation to safeguard the security of other contracting parties. These provisions are subject to review and modification upon the outbreak of hostilities,[5] and it is not inconceivable that war-time conditions may require concession to the sending state of a far greater measure of jurisdiction than is now provided by the Agreement. By contrast to this distribution of jurisdiction, the members of the E.D.C. will ultimately transfer to that organization penal jurisdiction over members of the European Defence Forces, who will be subject to a common disciplinary code and to common legislation drawn up by the member states.[6] Transitional provisions stipulate that members of the forces will, until that time, for the most part remain subject to national law and will be tried by national tribunals acting by delegation of the

[1] Article I, N.A.T.O. Status of Forces Agreement; Article 33, Jurisdictional Protocol to the E.D.C. Treaty; see also Article I of the Administrative Agreement between the United States and Japan, 28 February 1952, in *D.S.B.* 26 (1952), p. 382.

[2] Similar terminology is used in the E.D.C. The three categories are replaced by the single group 'Members of the Forces' in the Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany (Article 1, paragraph 7).

[3] See Barton, 'Foreign Armed Forces: Immunity from Supervisory Jurisdiction', in this *Year Book*, 26 (1949), p. 380, and 'Foreign Armed Forces: Immunity from Criminal Jurisdiction', in ibid. 27 (1950), p. 186.

[4] Article VII.

[5] Article XV, paragraph 1.

[6] Article 79, Treaty Constituting the European Defence Community, and Article 19, Jurisdictional Protocol.

Community or by European tribunals of national composition.[1] The provisions of the E.D.C. Treaty and of the N.A.T.O. Agreement in this respect are not consistent, and modification of the latter will probably be required to take account of the special régime of the E.D.C. forces, both ultimately and during the transitional phase.

The question of the amenability of the forces to civil jurisdiction is inseparable from the settlement of claims by the governments of the sending and receiving states. The N.A.T.O. Status of Forces Agreement provides for a waiver of inter-governmental claims for damage to government property caused by a member or employee of the forces of the other state except in the case of substantial damage to property not in the possession of the armed forces.[2] Claims arising out of the acts or omissions of the forces done in the performance of official duty which cause damage to 'third parties' are to be settled by the tribunals of the receiving state according to its laws, and the sending state is to be required to pay 75 per cent. of the awards.[3] This novel formula, which is an adaptation of that incorporated in the Brussels Treaty Status of Forces Agreement,[4] in effect provides that claims arising out of acts attributable to the sending state are settled under a foreign law, the 25 per cent. of the awards chargeable to the receiving state being a deterrent to excessive awards. This method of settling claims should probably put to rest complaints that it is inequitable that damage done by foreign troops to inhabitants of the receiving state should be recompensed in the discretion of the responsible foreign state.[5] Damage to individuals caused by the forces of the E.D.C. will be settled by local Indemnity Commissions acting on behalf of the Community.[6] The Jurisdictional Protocol states that the Community will make reparation for damage 'caused by the dereliction of its services', including that caused by the fault of its agents in the exercise of their functions, that caused within installations under its charge, and damage to roads and public installations of its members.[7]

No less important than the establishment of responsibilities in jurisdictional matters is the provision of fiscal immunities for the forces and the

[1] Chapter II, Jurisdictional Protocol.

[2] Article VIII, paragraphs 1 and 2. Damage caused to government property not in the possession of the forces is to be submitted to arbitration, if the claim exceeds £500.

[3] Article VIII, paragraph 5. *Quaere*: Is a claimant who is a national of, or connected with the forces of, the state responsible for the damage a 'third party' whose claim must be settled under the laws of the receiving state?

[4] Article 8, Agreement relative to the Status of Members of the Armed Forces of the Brussels Treaty Powers.

[5] Provision is made for *ex gratia* payments in the case of claims arising out of tortious acts or omissions which are not done in the performance of official duty. In the case of the United States, such payments could continue to be made under the provisions of the Foreign Claims Act (55 Stat. 880), as amended (31 U.S.C. 224d et seq.).

[6] Article 10, Jurisdictional Protocol.

[7] Articles 1–9, Jurisdictional Protocol.

persons accompanying them. The presence of members of the forces or of the civilian component in another N.A.T.O. country of which they are not nationals is not, under the N.A.T.O. Agreement, regarded as establishing residence or domicil for tax purposes.[1] Such persons may also import their personal effects free of customs duties when they first arrive in a country to take up service there, but they are thereafter subject to normal customs inspections and duties.[2] An immunity from taxation, measured by the same type of standard applied under the N.A.T.O. Status of Forces Agreement, is also applicable to personnel of the European Defence Forces.[3] These immunities are limited in character and do not, for example, in the case of N.A.T.O. personnel extend to dependents or to taxes, such as those on transactions, which are not imposed on the basis of residence or domicil.

In addition to these provisions, the N.A.T.O. Status of Forces Agreement and the group of agreements relating to the E.D.C. contain stipulations regarding respect for the law of the receiving state, the entry and departure of members of the forces who are to be identified by their orders and identity cards, the recognition of foreign licences and driving permits, the wearing of the uniform, and the carrying of arms.[4] A number of these provisions are designed to facilitate the movement of forces from country to country and to avoid vexatious, and even ludicrous, delays which would be caused if military units were to be subjected to the usual border-crossing formalities. The N.A.T.O. Status of Forces Agreement is, however, primarily oriented towards operations in time of peace, express provision being made for its modification in the event of hostilities and even for unilateral suspension of its provisions after due notice in time of war.[5]

Although the Status of Forces Agreement purports to deal with the status of *persons*, including the members of the forces of one N.A.T.O. country stationed in or passing through the territory of another, it also contains undertakings regarding the privileges and immunities of the state itself.[6] This confusion of purpose is reflected in occasional ambiguous terminology[7] and in sudden silences at places where it might be expected

[1] Article X, paragraph 1, N.A.T.O. Status of Forces Agreement.

[2] Article XI, paragraphs 1, 5, 6.

[3] Article 41, Convention Relative to the Status of European Defence Forces and the Tax and Commercial Régime of the European Defence Community.

[4] Respectively, Articles II, III, IV, V, and VI of the N.A.T.O. Status of Forces Agreement, and Articles 1, 2–4, 6, 9–10 of the Convention Relative to the Status of European Defence Forces.

[5] Article XV.

[6] Article IX, paragraph 2, for example, deals with local purchases in the receiving state by the sending state, and paragraph 4 thereof with the filling of local civilian labour requirements.

[7] Although 'force' is defined in Article I as meaning the personnel of the armed forces of one Contracting Party while in the territory of another, the same term is used in Article XI, paragraph 2, as referring to the armed forces in their collective sense rather than as individuals. The full term, 'member of a force', used in paragraphs 1 and 5 of the same article, is not required if the definition in Article I is to be taken at face value.

the agreement would speak. While it deals specifically with the customs immunities of both the force[1]—or more properly the state whose forces they are—and of the members of the force,[2] only the immunity from taxation enjoyed by the members of the forces is considered.[3] Several matters, such as authority to establish military post offices and welfare activities, including military canteens and 'post exchanges', which might be expected to appear in such an agreement, are left to bilateral arrangements.

Forces present in a foreign state for an extended period require housing, installations, training areas, and other facilities. Only a rudimentary provision that the receiving state is to make suitable arrangements to make buildings and grounds available to the forces of the sending state is found in the N.A.T.O. Status of Forces Agreement.[4] At the request of N.A.T.O., the United States has entered into agreements with a number of countries whereby detailed provision is made for the furnishing of facilities and areas to the United States in the interest of collective defence.[5] These arrangements normally provide that the host state will, without reimbursement, grant facilities to the United States to be developed either by the United States alone or jointly by the two governments. The United States is given the right to improve and fit the areas for military use, install equipment and erect installations, store supplies, bring in the necessary military and civilian personnel, and otherwise prepare the areas concerned for military use. The problem of the ownership of the installations erected and equipment brought in is often worked out by providing that property which is capable of being removed remains the property of the United States and may be taken out of the country on the termination of the agreement, while immovable property is either expressly or impliedly recognized as passing immediately or ultimately to the receiving state.[6] That these agreements are concerned with more than the particular military needs of the two parties thereto is indicated by stipulations that the use of the areas and facilities may be extended to other N.A.T.O. members by agreement of the parties.[7] These agreements by themselves are only the beginning of the joint arrangements which must be made. They expressly state that they will be supplemented by technical agreements which will specify the exact facilities which will be made available and the detailed conditions under which they may be

[1] Article XI, paragraphs 2, 3, and 4.
[2] Article XI, paragraphs 5 and 6.
[3] Article X.
[4] Article IX, paragraph 3.
[5] Agreement between the Government of the United States of America and the Government of the Kingdom of Denmark concerning the defence of Greenland, 27 April 1951, *T.I.A.S.* 2292; Defence Agreement between the United States of America and the Republic of Iceland, 5 May 1951, *T.I.A.S.* 2266; Agreement between the United States and Portugal regarding Military Facilities in the Azores, 6 September 1951, in *D.S.B.* 27 (1952), p. 14. A number of other arrangements exist, but their texts have not been made public.
[6] Article XI, Agreement with Denmark; Article 3, Agreement with Portugal.
[7] Article IV, Agreement with Denmark; Article 9, Agreement with Portugal.

used.[1] The establishment of the European Defence Forces will not bring to an end arrangements of this nature concerning the facilities and installations to be made available by a state to forces not its own. A protocol to the Treaty provides that military installations are to be made available to the E.D.C. at its request by agreements concluded between the individual state and the Community.[2] The general principle discernible in the articles relating to this subject is that the state furnishing facilities is to make available to the Community without cost the installations which it already owns, but that the Community will bear the cost of acquiring any other facilities and of any improvements in the installations.[3]

The occupation of Germany and Austria has required the establishment of lines of communication through other states so that the forces in those two countries may be supplied and maintained, both for occupational purposes and for defensive ends within the structure of N.A.T.O.[4] The agreements regarding these facilities provide for the furnishing of certain installations and rights, including those privileges peculiar to the function of a line of communications, such as the right to install pipelines. Status of forces provisions are also required.

Reference must also be made to a further type of military facility, concerning which agreements must be concluded. The Protocol on the Status of International Military Headquarters Set Up Pursuant to the North Atlantic Treaty[5] serves a double function: it establishes the immunities peculiar to a headquarters and also adapts the N.A.T.O. Status of Forces Agreement to an international headquarters. In the latter respect, for example, the Protocol provides that the waiver of certain inter-governmental claims effected by Article VIII of the Status of Forces Agreement will apply equally to an Allied Headquarters and that the tort claims of 'third parties' will be dealt with as if the Allied Headquarters were a sending state.[6] Requirements of co-operation in such matters as investigations of offences are recognized to rest both on the force to which the individual concerned belongs and on the headquarters to which he is assigned,[7]

[1] Since the agreements mentioned were concluded before the coming into force of the N.A.T.O. Status of Forces Agreement, they contain interim provisions concerning the status of the forces (see Articles VII–IX, Agreement with Denmark, and Annex on the Status of United States Personnel and Property, annexed to Agreement with Iceland, *T.I.A.S.* 2295).

[2] Article 21, Convention Relative to the Status of European Defence Forces and the Tax and Commercial Régime of the European Defence Community. [3] Articles 22–26.

[4] Treaty between the United Kingdom and Belgium regarding Privileges and Facilities for British Forces in Belgium in Connexion with the Occupation of Germany and Austria, 11 March 1946, *T.S.* No. 13 (1949), *U.N.T.S.*, vol. 1, p. 387; see *D.S.B.* 25 (1951), p. 94, concerning a line of communications across Italy.

[5] 28 August 1952. An analogous Agreement on the Status of the North Atlantic Treaty Organization, National Representatives and International Staff (U.S. Senate Doc. Executive U, 82d Congress, 2d Session (1952)) provides in Article 2 thereof that it is not applicable to military headquarters or military bodies.

[6] Article 6. [7] Article 3, paragraph 2.

while, in the matter of criminal jurisdiction, it is stated that the individual on duty in a headquarters remains subject to the penal law of the forces in which he serves.[1] The more usual headquarters provisions are also included —recognition of the juridical personality of the Supreme Headquarters (Europe and Atlantic),[2] freedom from taxation and customs duties,[3] power to hold funds,[4] and immunity of archives.[5]

One aspect of stationing forces in a foreign country which requires particular attention is the necessity of obtaining immunity from local taxation.[6] When states are banded together in an international military organization, it is particularly difficult to justify taxation by a state the economic burden of which will be passed on to another participant in the same group.[7] The problem is not only one of the taxation of the property or transactions or activities of the state itself but of taxes which will add to the ultimate costs borne by the state concerned. Taxes imposed by state A on a contractor erecting facilities for state B within state A under a contract which provides for the reimbursement of such taxes by state B constitute a direct burden on the treasury of state B. Some taxes can be readily identified; others cannot be traced. The matter is not dealt with in the N.A.T.O. Status of Forces Agreement, and it has been necessary for the United States, as the principal financial contributor to the defence of the North Atlantic area, to enter into special tax agreements with individual N.A.T.O. countries.[8] These agreements follow a common pattern of recognizing the principle that expenditures by the United States in such N.A.T.O. countries should not be subjected to taxation, and specify those particular taxes, imposed directly on the United States or on contractors with it, as to which exemption is to be granted. The tax régime envisaged by a Protocol to the E.D.C. Treaty provides, in a quite different manner, that goods acquired by the community within a member state will be subject to the normal duties and taxes, except that transportation from state to state within the Community will not be considered as an importation or exportation, and that goods acquired in non-member states will be subject to taxes and duties upon entry into the area of the Community.[9] The Community

[1] Article 4, paragraph (*a*). [2] Article 10.
[3] Article 8. [4] Article 12. [5] Article 13.
[6] See Fairman and King, 'Taxation of Friendly Foreign Armed Forces', in *A.J.I.L.* 38 (1944), p. 258.
[7] The Congress of the United States has expressly forbidden the expenditure of mutual security funds 'for payment of taxes' (sec. 521, Mutual Security Act of 1951, 65 Stat. 384; 22 U.S.C. 1672).
[8] With the Netherlands, 7 March 1952, *T.I.A.S.* 2563; Italy, 5 March 1952, *T.I.A.S.* 2566; Iceland, 5/18 March 1952, *T.I.A.S.* 2557; Denmark, 7/9 April 1952, *T.I.A.S.* 2546; the United Kingdom, 17/18 March 1952, *T.I.A.S.* 2559; France, 13 June 1952, *T.I.A.S.* 2556, 2655; Luxembourg, 13 March 1952, *T.I.A.S.* 2538; Belgium, 18 March/7 April 1952; and Norway, 27 June 1952.
[9] Title II, Chapter I, Convention Relative to the Status of European Defence Forces and the Tax and Commercial Régime of the European Defence Community.

is to be exempt from payment of taxes on income and capital, except with respect to assets not utilized for the normal activities of the Community.[1]

The military assistance legislation of the United States has provided for aid not only to individual states but to international organizations and groups of states as well.[2] The requirement of such legislation that the states receiving military aid give assurances concerning its use[3] has been met through agreements with the N.A.T.O. members, whereby they have undertaken the obligations required by the municipal law of the United States.[4] The law of the United States already authorizes military aid to the E.D.C., and the Treaty recognizes that the Community itself will be entering into agreements of this nature.[5]

The multilateral and bilateral agreements to which reference has been made are only representative of the international arrangements which international military command entails. The solution of problems of peacetime organization of international forces through compromise and agreement will be convincing proof that close co-operation in military matters does not require the stimulus of actual hostilities.

III. *Legal problems in time of war*

The law of war has grown up in the context of war between one nation and another. A war between coalitions of states has been regarded as creating a network of bilateral relationships running between each belligerent state on the one side and each belligerent state in the other camp. The emergence of international forces, integrated in command structure alone or on a more comprehensive basis, has created new problems for the law of war, with which even the most recent treaties on the subject have failed to deal. For example, the Geneva Conventions of 1949 were adopted by 'High Contracting Parties',[6] all of which were states, and are open to accession by 'Powers'.[7]

One of the oldest problems of combined operations by the forces of

[1] Article 39.

[2] Sec. 2, Mutual Security Act of 1951 (65 Stat. 373), as amended (22 U.S.C. 1651); ibid., sec. 509; sec. 502, Mutual Defense Assistance Act of 1949 (63 Stat. 717; 22 U.S.C. 1573); ibid., subsec. 408 (*e*).

[3] Sec. 402, Mutual Defense Assistance Act of 1949; sec. 511, Mutual Security Act of 1951.

[4] Mutual Defense Assistance Agreements between the United States and Belgium, 27 January 1950, *T.I.A.S.* 2010; Denmark, 27 January 1950, *T.I.A.S.* 2011; France, 27 January 1950, *T.I.A.S.* 2012; Italy, 27 January 1950, *T.I.A.S.* 2013; Luxembourg, 27 January 1950, *T.I.A.S.* 2014; the Netherlands, 27 January 1950, *T.I.A.S.* 2015; Norway, 27 January 1950, *T.I.A.S.* 2016; the United Kingdom, 27 January 1950, *T.S.* No. 13 (1950), *T.I.A.S.* 2017; Portugal, 5 January 1951, *T.I.A.S.* 2187.

[5] Article 99, Treaty Constituting the European Defence Community.

[6] Common Article 1, Geneva Conventions of 12 August 1949 for the protection of war victims, *U.N.T.S.* I. 970–3.

[7] Article 60, Wounded and Sick Convention; Article 59, Wounded, Sick, and Shipwrecked Convention; Article 139, Prisoners of War Convention; Article 155, Civilians Convention.

several countries has been that of determining who is entitled to war booty, to property seized in occupied areas, and to naval vessels. In the last respect, there have been a number of agreements entered into between allies concerning the disposition of enemy vessels captured through the actual collaboration of ships of the allies concerned.[1] There is some reason to question whether, in an action in which a large number of states participate, only that state or those states whose forces actually participate in the capture on land or at sea should be entitled to the benefit of the property, to the exclusion of the other participating states.[2] The community of enterprise involved in the membership of a number of states in an international military command should probably be a sufficient basis for denying that the actual captor or captors should alone profit from their action. This is not to deny that the captor should be allowed to exploit captured property for its own immediate military needs, but it does suggest that an accounting should be kept of such captured or seized property and that an equitable financial settlement should be arrived at among the states represented in the international command. What solution is applied to the disposal of captured property is, however, fundamentally a matter for agreement,[3] for without such an agreement existing international law can furnish little guidance.

Some difficulty is also presented by the necessity of determining what state is the Detaining Power for prisoners of war. In those instances in which the applicable conventions impose obligations of a fixed nature on the Detaining Power, there can be little doubt about the standard of conduct to which the Detaining Power is to be held. However, in a number of respects, the standards to be applied to prisoners of war are measured by the standards applicable in the territory or in the armed forces of the detaining state. Perhaps the most obvious example is the requirement that a prisoner of war may be visited with judicial punishment only for acts forbidden by the law of the Detaining Power or by international law and that he be tried by the same courts and according to the same procedure 'as in

[1] Instances of such agreements are collected in Phillimore, *Commentaries upon International Law*, vol. iii (1885), pp. 612–13, and in Wheaton, *International Law*, vol. ii (7th Eng. ed. by Keith, 1944), pp. 312–13, 591. See Exchange of Notes between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America relating to the Use and Disposal of United Nations Vessels Captured or Found by their Forces in the Course of Operations for the Liberation of Europe, 7 May/15 June 1945, *T.S.* No. 28 (1946), *T.I.A.S.* 1556, which provided that an Allied Commander in Chief was to have absolute discretion over United Nations vessels captured by his command or within his area. When the vessels could be turned over to individual states, they were to be restored to the state in which they were previously registered or the flag of which they had the right to fly, regardless of the captor or the flag they were flying when captured. See also the Naval Prize Act, 1864 (27 & 28 Vict., c. 25), s. 35.

[2] Cf. Downey, 'Captured Enemy Property: Booty of War and Seized Enemy Property', in *A.J.I.L.* 44 (1950), pp. 495–6.

[3] See the order of the 21st Army Group, July 1944, subject: 'Ownership of Movable Property Abandoned by or Captured from the Enemy', reproduced in Smith, 'Booty of War', in this *Year Book*, 23 (1946), at p. 238.

the case of members of the armed forces of the Detaining Power'.[1] The same type of standard is applied in a number of other provisions.[2] If prisoners of war are held in a compound guarded by troops of states A, B, and C, who are in turn commanded by an officer of state D, responsible to superiors drawn from the armed forces of states A, B, C, D, and E, it may be virtually impossible to determine whether any single state is the Detaining Power. With whom the Protecting Power or the International Committee of the Red Cross is to communicate also becomes correspondingly uncertain. In the case of the action on behalf of the United Nations in Korea, the United Nations Command, the field force, has promulgated a penal code and regulations to be applied to the trial of prisoners of war held by that Command.[3] The existence of these directives would appear to indicate that the prisoners of war are regarded as being prisoners of the Unified Command, which functions as a Detaining Power. Since the Unified Command, as distinguished from the United States, has no penal code of its own, it would appear to follow from this view that it may be necessary to improvise a penal code in order to provide basic safeguards for prisoners of war. It might be argued with considerable force, however, that the prisoners of war are in the custody of the individual states which actually hold them and that the penal laws of those individual states are alone applicable to the prisoners. One solution for future international military commands, such as N.A.T.O., would be an agreement that certain states would be designated to be responsible for the detention of prisoners of war. A solution of a more fundamental nature would be a modification of the applicable treaties to substitute fixed standards for those applicable under national law, coupled with a recognition that an international military command might itself become a party to the conventions.

The internationalization of war crimes proceedings has been impeded rather than advanced by the Geneva Conventions of 1949. The effect of Articles 85, 99, and 102 of the Prisoners of War Convention is to require that prisoners of war accused of war crimes be tried in the same courts and according to the same law as is applicable to the armed forces of the Detaining Power.[4] Since it is improbable that the military law of a Detaining

[1] Articles 82, 84, 99, and 102, Geneva Prisoners of War Convention of 1949, *U.N.T.S.*, vol. 1, p. 972.

[2] Articles 20 (evacuation), 51–53 (labour), and 60 (pay). Under the Civilians Convention, *U.N.T.S.* I, 973, it is necessary to know what state is the Occupying Power for the purpose, for example, of Article 73 (appeals to courts of the Occupying Power).

[3] Articles Governing United Nations Prisoners of War, 23 October 1951; Rules of Criminal Procedure for Military Commissions of the United Nations Command, 22 October 1950 (Trial of Accused War Criminals); Supplemental Rules of Criminal Procedure for Military Commissions of the United Nations Command, 6 October 1951 (Trial of Prisoners of War for Post-capture Offences); Procedure Governing Non-judicial Punishment of Prisoners of War, 19 October 1951.

[4] Since Article 85 requires that prisoners of war prosecuted for acts committed prior to capture retain the benefits of the Convention.

Power will authorize foreign officers to sit in judgment on its own military personnel, the creation of international tribunals of mixed composition will in most cases prove impossible. National military tribunals within an international command which try war criminals cannot be described as international tribunals if they operate only with the authorization of the supreme commander, and deserve that name only if they are convened at his direction.[1]

The apportioning of occupation responsibilities among participants in an international military command has never been satisfactorily worked out.[2] There has either had to be recognition that the state actually occupying territory is legally entitled to continue that occupation, or the area concerned has had to be divided into zones, each administered by a separate state. Attempts to bring a co-ordinated administration to the entire area or country occupied, through the medium of control machinery, have not been highly successful. It should be a natural corollary of international military command that the administration of occupied territory should be kept on an international basis even after the cessation of hostilities. This result may be achieved in a variety of ways, e.g. through an international agency representing the states which had participated in the hostilities or through the designation of a state to assume that function and to be answerable to the same group of states.

The existence of international military commands also complicates the determination of responsibility for violations of international law. The refusal of the United States Ambassador to receive a Russian protest concerning the shooting down of a Russian plane by aircraft of the Unified Command is representative of the difficulties which inhere in this matter.[3] The problem can be further complicated by an armed conflict in which not all of the members of an international military command are bound by the same treaties concerning prisoners of war and other aspects of the law of war. In the Korean action, this difficulty has been met by the voluntary assumption by the Unified Command of the obligations created by the Geneva Conventions of 1949.[4]

The ideal solution to the problem of reconciling international military commands with a law of war attuned to wars between states alone has been reached in connexion with the projected European Defence Community. Article 80 of the Treaty establishing it asserts that the Forces will respect the rules 'embodied in conventions concerning the laws of war which bind one or more of its member states' and will enjoy the benefits of the same treatment as national forces. More important, however, a protocol[5] binds the

[1] See p. 332, *supra*. [2] See pp. 328 ff., *supra*. [3] See p. 336, n. 4, *supra*.

[4] Letter from Representative of the United States in the Security Council to the Secretary General, 6 July 1951, U.N. Doc. S/2232, *D.S.B.* 25 (1951), p. 189.

[5] Special Protocol, annexed to the Treaty Constituting the European Defence Community.

member governments to facilitate the adherence of 'the Community as such' to international conventions relating to the law of war. It would appear desirable that similar action should be taken by other international commands, including the forces of N.A.T.O., notwithstanding the fact that they are less closely integrated than the E.D.C. forces. Since the conventions regarding the conduct of warfare are open to accession only by 'Powers', special provision would appear necessary to permit accessions by international commands and defence organizations. In the case of international military commands which are integrated in command structure alone, further amendments of the conventions, particularly those applicable to prisoners of war, would be called for to take account of the fact that a number of states would be acting through the agency of an international command. Whatever solution is adopted, there must necessarily be a complex of agreements between the parties, assigning to particular states or apportioning between states responsibilities and rights created by the law of war regarding the custody of prisoners of war, the occupation of enemy territory, the appropriation of enemy property, the trial of war criminals, and the like.

Any high military commander, whether of national or international forces, is required to enter into agreements of an international nature as an incident to the conduct of hostilities. When the supreme commander of several national contingents concludes such an agreement, he must perforce speak not only in the name of all the troops which he commands but also on behalf of the governments furnishing the troops. The instruments of surrender executed by Italy, Germany, and Japan during the Second World War were each received by a supreme commander.[1] In some cases it was specifically indicated that he was acting on behalf of certain specified governments,[2] while in others no mention was made of that fact.[3] It is quite clear, however, that in all instances the supreme commander acted as a representative of several states, thus affording an interesting instance of a nation conducting its foreign relations through a public officer of a state allied with it. Similarly, other politico-military agreements, such as that concluded between General Eisenhower and Admiral Darlan in 1943,[4] were concluded by a military commander in the name of several governments. If friendly territory liberated from the enemy must be administered by military forces because of the inability of the local government immediately to resume its functions, a 'civil affairs' agreement is customarily

[1] Italian Military Armistice, 3 September 1943, *T.I.A.S.* 1604; Act of Military Surrender (Germany), 8 May 1945, *E.A.S.* 502; Instrument of Surrender (Japan), 2 September 1945, *E.A.S.* 493; see also Armistices with Bulgaria, Hungary, and Roumania, as cited *supra*, in n. 5, p. 328. [2] In the cases of Italy, Bulgaria, Hungary, and Roumania.

[3] In the cases of Germany and Japan.

[4] Announcement of 7 December 1942, concerning the co-operation of French West Africa and Togoland with the American and British forces, and an accompanying letter from General Eisenhower to the French Governor General.

concluded with the government whose territory it is. A number of such agreements concluded in anticipation of the liberation of territory by an Allied Commander in Chief[1] followed the peculiar pattern of being executed on behalf of individual states, such as the United States or the United Kingdom, sometimes by an international commander acting in his national military capacity. A more reasonable inference from the international function of such officers would be the conclusion of the civil affairs agreement by the supreme commander on behalf of the states furnishing forces to his command. These agreements, which normally were entered into with one of the states furnishing forces to the supreme commander, performed the dual purpose of a 'status of forces' agreement and an authorization by the proper government of the area of a temporary military administration by the Allied Commander in Chief. In the first respect, they dealt with such familiar matters as criminal and civil jurisdiction, the settlement of claims, and immunity from taxation. In the other aspect, they defined the rights of the military forces with respect to the government of the liberated area until the proper government could assume this function, jurisdiction over the local populace, requisitions by the military forces, liaison with officers of the local government, settlement of property questions, and the use of currency. In effect, they dealt with military administration by an international military command of the territory of a participant which could not, for military reasons, immediately perform that task itself. It may be expected that agreements of this nature will continue to be necessary in international commands of the future, since even as integrated a command as the European Defence Forces is not presently charged with responsibility for the civil administration of territory.

The extent to which the law of war is applicable to the lawful and unlawful belligerent is a problem which is not peculiar to armed conflicts in which an international military command participates. However, the actual existence of military action undertaken in the name of the United Nations and the probability that wars of the future will be fought by coalitions of states in the exercise of the right of collective self-defence make this question of particular pertinence to the activities of international military forces. Suggestions have already been advanced that forces designated as those of the United Nations are, by reason of their status, not bound by the law of war and are authorized to choose from the body of law thus

[1] Exchanges of Notes between His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland and the Belgian Government concerning Civil Administration and Jurisdiction in Belgian Territory Liberated by an Allied Expeditionary Force, 16 May 1944, *T.S.* No. 19 (1946); Agreement between the United States of America and the Netherlands respecting the Arrangements for Civil Administration and Jurisdiction in Netherlands Territory Liberated by an Allied Expeditionary Force, 16 May 1944, *T.I.A.S.* 2212; similar Agreements between the United States and Norway, 16 May 1944, *T.I.A.S.* 1514, and France, 25 August 1944, *T.I.A.S.* 2313.

discarded those principles which, consistently with the dictates of humanity, may seem useful to them.[1] If this view is to be given application to that portion of the law of war which regulates the conduct of hostilities, there is reason to suppose that it will lead to aggravation of the hardships of war rather than to their mitigation. The Unified Command itself has not yielded to this view and has announced its intention to comply with the Geneva Conventions of 1949 and the applicable provisions of Convention No. IV of The Hague, notwithstanding the failure of the enemy to conduct itself similarly.[2] This action was taken voluntarily by the Unified Command, since no treaty regarding the conduct of warfare was of its own force applicable to the hostilities in Korea.

That the position which has been taken by the Unified Command is a proper one appears to be a valid inference from several considerations. In the first place, that portion of the law of war which regulates the conduct of hostilities has the purposes of protecting certain categories of persons, such as prisoners of war and peaceful civilians, from the extreme hardships of war and of preserving certain avenues to peace through the non-hostile intercourse of the belligerents.[3] Whether a party to the conflict is a single state or several states allied, whether engaged in lawful or unlawful warfare, whether or not acting in the name of an international organization, these fundamental purposes of the law retain their validity. Furthermore, since the law of war is itself dictated by humanitarian considerations, it is extremely difficult to segregate out certain 'humanitarian principles' from the entire body of the law.[4] Until the establishment of an effective and universally recognized international police force, modifications of the law governing the conduct of land warfare should be consistent with its long established rôle of ameliorating the conditions of warfare. Secondly, if forces of an international character, including those acting in the name of the United Nations, feel themselves free to depart from the law of war by selecting for application only those principles which appear of utility to them, an enemy can justifiably be expected to take the same view. The humanitarian purpose of the law of war is of itself not a sufficient inducement to belligerents to adhere to it. They must also be assured that it is made up of principles to which they have both subscribed, that it will be applied on a reciprocal basis, and that it does not furnish an undue military advantage to one party

[1] 'Should the Laws of War Apply to United Nations Enforcement Action?', Report of the Committee on Study of Legal Problems of the United Nations, in *Proceedings of the American Society of International Law*, 1952, pp. 216, 220.

[2] See letter of the United States Representative in the Security Council, cited p. 355, n. 4, *supra*.

[3] I.e. the law relating to cartels, surrenders, armistices, parlementaires, and the like.

[4] The possibility of a distinction of this nature is suggested in the Report of a Committee of the American Society of International Law, cited in n. 1, *supra*, and in Taubenfeld, 'International Armed Forces and the Rules of War', in *A.J.I.L.* 45 (1951), p. 671.

over the other. Ingenious explanations by an international force of the inapplicability of the law of war are no substitute for the certainty and mutuality which belligerents must, for their own protection, expect of the law. If this basis for agreement is lost, it is those whom the law of war seeks to protect who will suffer. A third consideration, admittedly not relevant to the Korean action, is that in the future states will probably be bound by conventions which, while referring to 'war', have been construed to be applicable generally to armed conflicts of an international character,[1] or by treaties like the Geneva Conventions of 1949, which apply not only to declared wars but to 'all cases . . . of any other armed conflict'.[2] Even if action by troops operating in the name of the United Nations is not a 'war' in its traditional sense,[3] it is inescapable that it is 'armed conflict'. If the existing law of war is to be disregarded by those forces which wage war or carry on hostilities lawfully, failure to comply with treaty obligations voluntarily assumed after the creation of the United Nations cannot be justified by appeals to a higher morality or humanitarianism.

Although, therefore, international forces, including those acting in pursuance of recommendations of the Security Council, must at present continue to submit themselves to the law of war,[4] changed international relations may eventually call for modifications of this law. Universality of membership in the United Nations, the abolition of the veto now held by the great military Powers, the possibility of international legislation, and the establishment of international police forces would be requisites of any far-reaching changes in the law. It will then be proper to adopt rules governing the conduct of the international forces and of those of the unlawful belligerent.[5] Until that day, the great development which is taking place in the techniques of international military organization must be accompanied by deliberate conservatism in relation to the law of war, which, at the present stage of international integration, calls for such changes only as are necessary to take account of the existence of international military forces.

[1] Grob, *The Relativity of War and Peace* (1949), p. 217.

[2] Common Article 2.

[3] It may be possible to distinguish 'war' in the sense of any armed conflict between communities and 'war' in the sense of armed conflict between states whose unrestricted legal right to resort to force is recognized by the law of nations. The law of war may be applicable to 'war' in its first and broader sense, which would include operations on behalf of the United Nations, as well as to 'war' in this second and more limited sense.

[4] If the law of war is to be modified to take account of illegal war, the first step which might reasonably be taken is to deny that an aggressor or other unlawful belligerent acquires title to property, as now recognized by the law of nations (see Lauterpacht, 'Rules of Warfare in an Unlawful War', in *Festschrift für Hans Kelsen* (1953) for a convincing statement of this view).

[5] It would appear that those changes to be effected in rights and duties in case of illegal use of force which are suggested by Professor Jessup in *A Modern Law of Nations* (1950), pp. 210–21, should be postponed until that time.

THE PROBLEM OF THE REVISION OF THE LAW OF WAR[1]

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I

On 20 April 1949 the International Law Commission decided, for various reasons,[2] not to include the law of war in the list of topics which it selected for study in pursuance of its tasks of codifying and developing international law. Yet it is significant that on 21 April—the very next day—there opened at Geneva a Conference of sixty-one states which on 12 August adopted four Conventions[3] revising, developing, and codifying a very substantial part of the law of war—a historic and in many ways almost a revolutionary piece of international legislation transcending in some respects the achievements of the two Hague Conferences. One of these Conventions deals with the relief of wounded and sick in armies in the field. Another is devoted to the amelioration of the condition of wounded, sick, and shipwrecked members of armed forces at sea. The third is an imposing codification of the law relating to the treatment of prisoners of war. While these three Conventions merely revise and expand—though on a very considerable scale—treaties already in existence, the fourth Convention, namely, that for the Protection of Civilians in Time of War, covers in many respects entirely new ground not touched by the Hague Conventions. Thus, for instance, although the Regulations attached to Hague Convention No. IV respecting the laws and customs of war on land protected the civilian population in occupied territory, they did so, in Articles 42–56, in somewhat general outline. They did not concern themselves directly with the position of civilian enemy nationals in belligerent territory.[4] The Geneva Protection of Civilians Convention of 1949—which

[1] The present article is based substantially on a lecture delivered in December 1952 in the Faculty of Laws of the University of Paris.

[2] Thus Professor Scelle expressed the view, on that occasion, that as the Charter of the United Nations had outlawed war there could no longer be any question of a law of war—although, in his opinion, there was room for regulation of hostilities waged by an international police force. The member from Soviet Russia urged that the Commission should categorically refuse to discuss war; that it should not even contemplate the possibility of a third world war; and that it should not transform itself into a legal general staff which would pursue its activities in concert with the general staff of the North Atlantic Treaty Organization : Doc. A/CN. 4/SR. 6, pp. 12, 14, respectively.

[3] Misc. No. 4 (1950) Cmd. 8033; *United Nations Treaty Series*, vol. 75.

[4] It was contended by some governments and writers that Article 23 (*h*) of the Hague Regulations, which forbade a belligerent 'to declare abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party', applied also to the territories of the belligerents as distinguished from the territories occupied by them. This contention was probably inaccurate. See Oppenheim, *International Law*, vol. i (7th ed., 1948), § 554 (11).

will be here referred to as the Civilians Convention—goes a long way towards filling these gaps. In addition to its main provisions formulated in seventy-eight Articles, it has enacted in a further sixty-two Articles detailed regulations concerning the treatment of interned persons both in occupied and in national territory.

The changes introduced by these Conventions go beyond a mere extension of the categories of protected persons. With a stroke of the pen the Civilians Convention abolished reprisals against the civilian population and its property.[1] The numerous decisions given by the various war crimes tribunals on the legitimacy and the limits of such reprisals—interesting and valuable as they are—merely clarify what, once that Convention is widely ratified, will become a relic of the past. In a single Article[2] consisting of six words that Convention did away with such customary rules as existed in the matter of taking hostages in occupied territory and elsewhere. When the Convention becomes generally accepted law there will no longer be occasion for discussion whether hostages may be killed, or put on locomotives to ensure the safety of trains, or merely imprisoned. The Convention protects not only some elementary rights of the individual—his life, honour, family rights, and religious convictions—but also, within the limited scope of its provisions, the no less fundamental right to non-discrimination on account of race, religion, or political opinion.[3] In stating expressly and repeatedly[4] that the inhabitants of occupied territory owe no duty of allegiance to the occupant, it rejects the contradictory and objectionable conception of so-called war treason, on the part of inhabitants of occupied territory, which is punishable as a war crime.[5] The Convention imposes certain minimum obligations of humane treatment even in armed conflicts which are not of an international character and even if the parties to the conflict, which may not be states, are not parties to the Convention[6]—an interesting example of obligations being imposed upon entities which are not normally subjects of international law.[7] While the Hague Regulations did not contain a single article relating to judicial criminal proceedings

[1] The right of the occupant to resort to reprisals and collective punishments against inhabitants of occupied territory was recognized, somewhat circuitously, in Article 50 of the Hague Regulations, which provided as follows: 'No general penalty, pecuniary or otherwise, can be inflicted on the population on account of acts of individuals for which it cannot be regarded as collectively responsible.' On the other hand, the Civilians Convention of 1949 provides in Article 33, which applies both within the territories of the belligerent and in occupied territory, that 'no protected person [i.e., protected by the Convention] may be punished for an offence he or she has not personally committed'; that 'collective penalties . . . are prohibited'; and that 'reprisals against protected persons and their property are prohibited'.

[2] Article 34. [3] Article 27. [4] Articles 67 and 68.

[5] See the passage in vol. ii of the 7th ed. (1952) of Oppenheim's *International Law*, p. 426, amending the text of previous editions. [6] Article 3.

[7] Similarly, Article 18 (2) of the Sick and Wounded Convention seems to address itself to individuals. It lays down that 'the civilian population shall respect these wounded and sick, and in particular abstain from offering them violence'.

against inhabitants of occupied territory, the Civilians Convention devotes fifteen elaborate Articles both to procedural safeguards and to the substantive law on the subject. With regard to the latter the Convention includes a remarkable provision which imposes obligations upon courts, as distinguished from the Contracting Parties, to apply certain principles—apparently in disregard, if necessary, of any law enacted by the occupant. Thus it is laid down that the courts 'shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law'.[1] In fact it might be said that this, in its limited sphere, is a veritable universal declaration of human rights; unlike the Declaration adopted by the General Assembly in December 1948, it is an instrument laying down legal rights and obligations as distinguished from a mere pronouncement of moral principles and ideal standards of conduct.

No account can be here attempted of the comprehensive changes and innovations introduced by the other three Conventions, especially that relating to the protection of prisoners of war. But reference may be made to some of the significant provisions bearing upon the application and enforcement of these Conventions. Thus the Parties to these Conventions must observe them not only in respect of the states which have ratified them or acceded to them but also in relation to belligerents who, without prior ratification or accession, after the outbreak of the conflict accept and apply their provisions. The general participation clause is expressly abandoned. Thus all four Conventions lay down that the states which are parties to them shall remain bound by these Conventions in their mutual relations even if one of the parties to the conflict is not a Party to the Convention. Moreover, while any state bound by the Convention is entitled to denounce it, such denunciation if made during a conflict does not take effect until peace has been concluded. Although the authors of the Conventions did not accept the wording of the more stringent plans put before them with regard to violations of the Conventions—such violations are not expressly described in the Conventions as war crimes—they accepted most of their substance. All Parties to the Conventions, whether belligerents or neutrals, are bound to seek out persons alleged to have committed grave breaches of the Conventions and to bring them for trial before their courts, regardless of the nationality of the accused.[2] No more emphatic affirmation of the principle of universality of jurisdiction with regard to the punishment of war crimes could be desired.

The preceding pages elaborate at some length the theme of the importance of these Conventions, and of the innovations which they introduce, for the

[1] Article 67.

[2] See, e.g., Articles 129 and 130 of the Prisoners of War Convention.

reason that—surprising as this may seem at first sight—they probably cover as much as two-thirds of the traditional law of war (as distinguished from the law of neutrality). It is useful—in fact it is one of the purposes of the present article—to draw attention to this result of the Geneva Conventions of 1949. For there may be a tendency, when we speak of the necessity for the revision of the law of war, to leave out of account the fact that these four Conventions have already revised a very substantial part of the law of war, and that they have not only revised it but have also expanded it in many respects out of all recognition.[1]

II

The significance of the achievement of the Geneva Conventions of 1949 is not in any way diminished by the fact that the part of the law of war which they cover is of a humanitarian character. For, although we may not always realize it, this is the main feature of practically all the rules of warfare covered by the Hague Regulations. A possible—though by no means obvious—exception may be found in such matters as spies, ruses of war, treatment of public enemy property and the somewhat procedural rules relating to non-hostile intercourse of belligerents, e.g. armistices, capitulations, and flags of truce. But even in these instances the humanitarian purpose of the rules in question is not altogether absent in so far, for example, as they aim at facilitating the care of wounded and the collection of the dead, at rendering possible a semblance of peaceful contact between the belligerents, and at bringing about the cessation of hostilities. Neither is the humanitarian purpose absent from the rules relating to the treatment of private enemy property and to devastation. For property is not merely an economic asset; it may be a means of livelihood. The same humanitarian purpose is also the governing factor in relation to most aspects of the regulation of the law of sea warfare, such as the restriction of the right of capture of small fishing craft, of postal correspondence, and of vessels engaged in charitable or scientific missions, or the rules which seek to restrict bombardment from the sea, or those intended to safeguard the lives of passengers and crews of merchant vessels. This is also essentially the character of those laws of war—such as the prohibition of dum-dum bullets, of weapons causing unnecessary suffering and rendering death inevitable, and of poisonous and asphyxiating gases—which consist in the limitation of the freedom of the belligerents in the choice of weapons and instruments of war. We shall utterly fail to understand the true character of the law of war unless we realize that its purpose is almost entirely

[1] See, e.g., the article by Dr. Kunz entitled 'The Chaotic Status of the Laws of War and the Urgent Necessity for their Revision', in *American Journal of International Law*, 45 (1951), pp. 37–61. See also Downey in *Proceedings of the American Society of International Law* (1949), pp. 101–8.

humanitarian in the literal sense of the word, namely, to prevent or mitigate suffering and, in some cases, to rescue life from the savagery of battle and passion. This, and not the regulation and direction of hostilities, is its essential purpose.[1] Rules of warfare are not primarily rules governing the technicalities and artifices of a game. They have evolved or have been expressly enacted for the protection of actual or potential victims of war. Accordingly, such a statement as 'the new Geneva Conventions of August 12, 1949, deal only with the protection of the victims of war'[2] would appear to show less than full appreciation of the realities of the legal situation.

In fact, it is probable that the rules of warfare as applied in the First and Second World Wars cannot be related to any overriding legal principle or principles other than those which are of a humanitarian origin or complexion. In any event, apart from them, there are probably at present no overriding, universally or generally agreed, juridical principles of the law of war. Consider, for example, what some have regarded in the past as the most fundamental principle of the law of war, namely, the distinction between combatants and civilians, a distinction based in turn on the proposition, put forward by Portalis and some other continental writers, that war is a contest between state and state only and between the armed forces of the belligerents. This view was not shared in the United States, in England, or in some other countries. In any case, whatever may have been the original merits of that distinction, the phenomenon of total war has reduced it, in most respects, to a hollow phrase. The growth of the numbers of combatants forming part of the armed forces of the belligerents; the increase in the number of non-combatants engaged in work of direct military importance, coupled with the growing obliteration of the distinction between work which is and work which is not of direct military importance; the growth of the offensive and destructive power of aircraft; the part played in modern war by the economic weapon, which renders practically impossible, in this respect, a differentiation between civilians and combatants —all these factors have combined to render unreal the traditional controversy as to who are the subjects of the relation of war. Moreover, in so far as the 'continental' doctrine implied that the laws of war are binding not upon individual human beings but only upon the metaphysical entity of the state, that doctrine must be regarded as a relic of the past.

There is only one principle in this sphere which has remained unchallenged by civilized states and which must remain undisputed as a

[1] The Preamble to the Hague Convention of 1907 respecting the Laws and Customs of War on Land refers, in the first place, to the desire of the Contracting Parties to serve, even in the extreme case of war, 'the interests of humanity and the ever progressive needs of civilization'. In the same Preamble it is stated that in matters not expressly provided for by the Convention the inhabitants and belligerents remain under the protection of the principles of international law 'as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience'.

[2] Kunz, loc. cit., p. 59.

dictate both of law and of humanity. That unchallenged principle is embodied in the rule that non-combatants, whether in occupied territory or elsewhere, must not be made the object of attack unrelated to military operations and directed exclusively against them. At the same time it is controversial, at least practice has made it controversial, whether the civilian population as such is entitled to protection, i.e. whether the belligerent is bound to desist from attacking, for the reason that they contain or are in the vicinity of a considerable number of civilians, objects whose destruction he considers to be of importance for the success of a single operation or of the strategy of the war as a whole. In the matter of aerial bombardment the practice of belligerents has not followed any such principle—although at the beginning of the Second World War it seemed to have received a measure of recognition by both sides. Explicit, though qualified, declarations were made to that effect in September 1939 by the governments of the United Kingdom and France as well as by the government of Germany. The former issued a declaration proclaiming their intention to conduct hostilities with a firm desire to spare the civilian population by confining aerial bombardment to 'strictly military objectives in the narrowest sense of the word'. As the war progressed, the protection of the civilian population from aerial bombardment became largely nominal. That result was not due merely to the reciprocal adoption of the practice of reprisals. It was due to the general acceptance of a notion of military objective capable of an enlargement so vast as to lose in fact any legally relevant content. In the end both governments[1] and writers of recognized authority on the subject were prepared to admit—and to fortify their conclusion by argument—the legality of both strategic and tactical bombing of centres of civilian population.[2]

Yet, it is submitted, it may be unprofitable to inquire whether the practice of aerial bombardment in the form and to the extent which it assumed at the end of the Second World War was in accordance with international law. Those who maintain that it violated international law must undertake the exacting task of proving that absolute respect for the life of the enemy civilian is a rule so fundamental, so overriding, and so uncontroversial as to render immune from direct military attack objects and localities whose destruction the belligerent considers vital for his purpose. The fact is that in the matter of aerial bombardment there is no rule firmly grounded in the past on which we can place reliance—for aerial bombardment is a new

[1] On 9 February 1944 Lord Cranborne declared in the House of Lords, on behalf of the British Government, as follows: 'It may well be . . . that these great German war industries can only be paralysed by bringing the whole life of the cities in which they are situated to a standstill, making it quite impossible for the workmen to carry on their work. . . . It is, I suggest, a full justification for our present bombing campaign': *House of Lords Deb.*, vol. 130, col. 753.

[2] See Spaight, 'Legitimate Objectives in Air Warfare', in this *Year Book*, 21 (1944), pp. 158–64, and *Air Power and War Rights* (3rd ed., 1947), pp. 267–73.

weapon which raises new problems. With regard to new weapons generally, past experience merely suggests that, although belligerents have often yielded to considerations of humanity and chivalry in matters which did not affect the supreme purpose of the war, they have refused to follow them when they threatened to assume the complexion of a decisive limitation of their freedom of action bent upon achieving victory.

To assert, therefore, that the practice of aerial bombardment as it was resorted to by both sides during the Second World War was according to international law illegal—which, in the circumstances, would mean that it constituted a war crime[1]—is to assume a legal rule based on the doctrine that the law of war provides for the absolute protection of the civilian population (as distinguished from the protection of civilians against attack directed individually or exclusively against them) and that such protection remains in its full legal vigour in an age of total warfare and the perfection both of aircraft and of ground and other defences against aerial attack. Yet is it not probable that we are here in the presence of what is no more than a postulate? Article 25 of the Regulations attached to Hague Convention No. IV prohibited 'attack or bombardment, by whatever means, of towns, villages, habitations, or buildings, which are not defended'. The expression 'by whatever means' included presumably bombardment from the air. But it is doubtful whether bombardment from the air was, at the Second Hague Conference, in the minds of the authors of the revised Convention. In essence the prohibition of bombarding undefended localities gave expression at that time—when the range of artillery was limited—to the law of conservation of military energy, seeing that a locality which was not defended was, as a rule, open to occupation by the belligerent and that to bombard it meant to waste effort and ammunition.[2] From this point of view there are no undefended places in relation to air warfare, in particular when a locality is provided with anti-aircraft defences. With regard to defended places, while some inadequate provision was made for sparing buildings devoted to art, charity, religion, and science, and historic monuments,[3] writers and military manuals expressed the view, fully substantiated by practice, that 'destruction of private and public buildings through bombardment has always been and is lawful, as it is one of the means of impressing upon the authorities the advisability of surrender'.[4]

Hague Convention No. IX of 1907 relating to naval bombardment, in

[1] It is of interest to note that Article 6 (*b*) of the Charter of the International Military Tribunal, which defined war crimes submitted to the jurisdiction of the Tribunal, did not refer directly to aerial bombardment—although it is probable that such reference was intended by the words 'wanton destruction of cities, towns or villages'. No conviction was recorded against any of the accused in connexion with a charge of indiscriminate bombing of the civilian population.

[2] See the *Consultation* of M. W. Royse in *La Protection des populations civiles contre les bombardements, consultations juridiques* (Geneva, 1930), p. 88.

[3] Article 27.

[4] See British *Manual of Military Law*, paragraph 122.

addition to permitting bombardment in case of non-compliance with a legitimate request for requisitions, abandoned to a large extent the test of 'defence' and substituted for it that of the presence of military objectives. These could be bombarded regardless of the presence of civilian population—though the Convention imposed a semblance of safeguards in the matter of previous notice and of certain categories of buildings. The Hague Rules of Aerial Warfare of 1923 relating to aerial bombardment were based on the test of military objective and its location. If situated within the zone of military operations—a term of some elasticity—military objectives could be bombarded regardless of the presence of large numbers of civilians. The category of military objective, it will be noted, was so widely drawn as to make most centres of population liable to aerial attack. It included, for instance, 'lines of communication or transportation used for military purposes'. In areas outside military operations the bombardment of military objectives was prohibited if it involved indiscriminate harm to the civilian population. That prohibition was based on the assumption that bombardment from the air, in face of powerful anti-aircraft defences and having regard to the unavoidable large margin of error in aiming and to the radius of the effect of the blast even in the absence of error, can be discriminatory. It assumed—incorrectly, as events proved—that governments would accept or act upon a rule which would make it possible for the belligerent to gain immunity for objectives of the highest military value by resorting to the device of placing them in centres of population outside the zone of military operations.

The Hague Rules were not ratified and were not acted upon during the Second World War—or after it. They were based on the principle formulated by John Bassett Moore, when introducing the American proposals, in the following orthodox wording: 'Among the elementary principles which the development of modern rules of warfare, running through several centuries, has been designed to establish and to confirm, the principle most fundamental in character, the observance of which the detailed regulations have largely been designed to assure, is the distinction between combatants and non-combatants, and the protection of non-combatants against injuries not incidental to military operations against combatants.'[1] It may or may not be relevant to inquire whether this was the principle underlying the practice of the belligerents, including that of the United States, during the Second World War. It is more relevant to recall that that practice has not been stigmatized by any considerable body of opinion as unlawful and criminal. It must be a matter for serious reflection—and an appeal to such reflection is one of the objects of the present article—whether the authority of international law and the prospects of any

[1] *The Collected Papers of John Bassett Moore*, vol. vi (1944), p. 153.

effective future regulation of this and similar vital questions might not be better served by the acknowledgement that the rule as formulated in 1923 by Moore did not even at that time, and does not at present, form part of generally recognized international law.[1]

There is one principle bearing on the subject under discussion which was embodied in the Hague Rules of 1923 and the essential correctness of which seems unimpeachable, namely, that it is unlawful to resort to bombing of the civilian population for the mere purpose of terrorization. For in this case the civilian population becomes the direct object of attack regardless of any connexion with a military objective. Admittedly, the practical importance of that exception is of limited value. In most cases centres of civilian population will in any case constitute centres of communication or contain or be located in the vicinity of some objectives which the attacking belligerent will claim to be of military importance. In these cases the terrorization of the civilian population, however real in intention and effect, can plausibly be represented as being incidental to attack upon military objectives.[2] Moreover, terrorization of the civilian population as a whole, independently of military objectives, and aiming at producing utter chaos, disorganization, and eventual rebellion as a means of defeating the enemy, has occasionally been represented as constituting in itself a legitimate military purpose. It is not necessary to dwell here upon these anarchic emanations of the doctrine of total war. It may be difficult to refute them with the help of mere logic. They may not be altogether alien to the practice—though not the avowed principle—of strategic bombing which is, at least in theory, directed against military objectives, however widely

[1] When in 1930 the International Committee of the Red Cross asked a number of lawyers and military experts whether it was possible to formulate precisely rules of international law protecting the civilian population outside the area of artillery fire against bombardment of any sort or to render these rules more effectual, Jonkheer van Eysinga in giving a negative reply to that question described it as a task both positive and highly beneficial to humanity to make public opinion aware of the fact that the protection of the civilian population against aerial attack is not realizable in practice (*La Protection des populations civiles contre les bombardements. Consultations juridiques* (1930), p. 221). This was also the view of some technical and military experts. Yet it is probable that, so far as the formulation of a legal rule is concerned, an affirmative answer to the question as put could have been given with little or no hesitation. For it is possible to formulate precise rules of international law which would give the desired protection. It is possible, for instance, to go much farther than the Hague Rules of 1923 and to lay down the precise rule that no centres of population may be bombarded outside a fifty mile radius of the actual front line regardless of the existence of military objectives. This would solve the problem—if governments were willing to accept that solution. The same applies—though with much greater technical difficulty—to selecting specific and rigidly limited purely military objectives which may be bombed outside the area of operations. But the very question put in 1930 by the International Committee of the Red Cross implied that already at that time the state of international law on the subject was doubtful.

[2] This, for instance, was the assertion put forward by Germany in regard to the aerial bombardment of Warsaw on 23 September 1939 and of Rotterdam on 14 May 1940. No such assertion, apparently, was made in connexion with the destruction on 6 April 1941 of the larger part of Belgrade in 'operation Punishment' (as named by the German High Command), following upon the refusal of Yugoslavia to become an ally of Germany.

conceived. Nevertheless it is in that prohibition, which is a clear rule of law, of intentional terrorization—or destruction—of the civilian population as an avowed or obvious object of attack that lies the last vestige of the claim that war can be legally regulated at all. Without that irreducible principle of restraint there is no limit to the licence and depravity of force. If stark terror and panic dissolving all bonds of organized life are an object at which the belligerent can legitimately aim, there is no reason why he should stop short of murdering the inhabitants of occupied territory—for such action is certain to create terror both in the occupied territory and in territory which he threatens to occupy. Nor is there any reason why any isolated hamlet or peaceful township should not be harassed, attacked, and obliterated—for that is clearly calculated to put the entire population of the territory of the adversary in a state of disorganizing fear. It is clear that admission of a right to resort to the creation of terror among the civilian population as being a legitimate object *per se* would inevitably mean the actual and formal end of the law of warfare. For that reason, so long as the assumption is allowed to subsist that there is a law of war, the prohibition of the weapon of terror not incidental to lawful operations must be regarded as an absolute rule of law.

III

If the legal position with regard to aerial bombardment is unhappily such as is described above, then the principal considerations there adduced are also relevant to the question of the legality of the use of the atomic weapon. It has been maintained by a high authority on the subject that while the bombing of the civilian population, when incidental to attack upon legitimate military objectives, however widely conceived, may still be within the borderline of legality inasmuch as it permits of some rough differentiation, this is not so with regard to the atomic weapon, the use of which must therefore in all circumstances be regarded as unlawful.[1] The validity of the distinction may be doubted. It has been rightly suggested that the havoc wrought by a concentrated attack by a large number of aircraft may be as vast and indiscriminate as that created by an atomic bomb. The distinction has no more validity than that which, by reference to the probable radius of devastation, considers resort to the atomic bomb to be legal as distinguished from the use of the hydrogen bomb. In the present state of the law—or absence of law—the only non-controversial and legally relevant reason for distinguishing between the atomic weapon and aerial bombardment, apart from the absolute prohibition of mere terrorization, would be that the use of the atomic weapon may be contrary to the conventional rules of international law prohibiting the use of weapons which cause unnecessary suffering or render death inevitable or which, because of the

[1] Spaight, *Air Power and War Rights* (3rd ed., 1947), pp. 273–7.

resulting general contamination, in effect amount to a use of poisonous and asphyxiating gases.[1] However, by comparison, these aspects of atomic warfare as well as the question of recourse to the atomic weapon against purely military objectives such as battleships, armed formations, and military installations distant from inhabited localities, constitute a secondary aspect of the problem of atomic warfare as compared with the obliterating force and destructiveness of its use in relation to the civilian population.

With regard to that major aspect of the problem we are thus driven to the conclusion that the position may not be essentially different from that with regard to aerial bombardment affecting the civilian population, namely, that the question of its legality is not capable of a categorical answer. If the answer is to be given in terms of existing law, it cannot be given in an unqualified negative except, perhaps, in so far as the practical impossibility of discrimination brings atomic warfare within the orbit of the absolute prohibition of terrorization.

It would thus appear that the total elimination or limitation, as a matter of law, of the use of the atomic weapon cannot be accomplished by way of a restatement of an existing rule of law. Such a restatement denying the legality of the use of the atomic weapon must, of necessity, be based on controversial deductions from supposedly fundamental principles established in conditions vastly different from those obtaining in modern—total and scientific—warfare. Such a restatement would be bound to ignore, or brand as illegal and criminal, recent practice as generally followed. In fact, it is submitted that it must be a matter for serious consideration by governments or by bodies such as the International Committee of the Red Cross, which may deem it their duty to promote acceptance of the prohibition of the use of the atomic weapon, whether it is necessary for this purpose to insist that its use either in general or in so far as it affects indirectly the civilian population is already illegal. If that were so, an express prohibition would be unnecessary. It is probable that the help which international lawyers can render on this issue is that of testifying not to any present illegality of the use of the atomic weapon, but to the absence of any clear rule laying down that it is illegal. The idea of bringing about international agreement for the prohibition or limitation of the use of the atomic weapon is prompted by moral and humanitarian considerations of such a compelling character that any effort in that direction is not likely to receive a notable accession of strength from controversial assertions as to the present illegality of the use of the atomic weapon either in general or against the civilian population.

[1] It has been suggested by Sir George Thomson—in *International Affairs*, 26 (1950), p. 467—that permanent contamination is produced only following upon the explosion of the atomic bomb under water.

However, the fact that the prohibition or limitation of the use of the atomic weapon may not follow inescapably from any existing legal rule or principle does not necessarily mean that the international lawyer has no contribution to offer on this weighty issue. In the absence of a clearly applicable rule of law he must recognize that the issue—in particular in view of its formidable political implications—is predominantly of a political nature. Nevertheless, he is not, as a lawyer, precluded from adducing considerations which, although not of a legal character, are not irrelevant for the formation of the law of the future. This applies especially to considerations of humanity which, as we have seen, underlay so much of the traditional law of war. The Judgment of the International Court of Justice in the *Corfu Channel* case shows that, in the absence of contrary practice, such considerations are not altogether irrelevant also in the sphere of the law of peace. There the Court held that among the reasons imposing upon the coastal state the duty to notify other states of the existence of minefields within its territorial waters were 'elementary considerations of humanity, even more exacting in peace than in war'.[1] So long as the international lawyer succeeds in not confusing the existing legal position with factors which may legitimately be taken into account in shaping the law, it is within his province to urge that those factors are, to that extent, important and relevant.

Secondly, although the law may be impotent, for a time, to provide a complete solution of problems of a predominantly political complexion, that does not necessarily mean that the law can play no part at all in meeting the resulting situation. Thus if, for the reasons stated, a radical solution by way of a general prohibition of aerial bombardment and of the atomic weapon should prove impossible for a time, a practical alleviation of the problem may be achieved not through a differentiation between legitimate and illegitimate objectives, but by methods which make such a differentiation irrelevant. These methods include the provision of safety zones and localities such as are foreshadowed in the Geneva Civilians Convention of 1949. The Articles of the Convention on the subject are of an optional character, and much perseverance and statesmanship may be required to induce governments to accept binding obligations in the matter and to agree to and undertake a measure of preparatory action in time of peace. Bodies such as the International Committee of the Red Cross, whose devotion to humanitarian ends lifts them above the realm of dialectics, can effectively meet the objection that such arrangements detract from the reality of the legal prohibition of war; that any regulation of warfare in this and other spheres is deceptive because unlikely to be observed; that it lulls our consciences by palliating the minor evil while leaving the major evils such as

[1] *I.C.J. Reports, 1949*, p. 22.

those of atomic warfare and war itself without a remedy; and that it removes a powerful deterrent of war by creating the illusion that it can be humanized and made bearable. For it is occasionally maintained that the very possibility of the use of a weapon fraught with consequences fatal to the survival of civilization may in itself provide the most powerful deterrent against yet another general conflagration. It is similarly asserted that the absence of such a deterrent may, correspondingly, become one of the contributory causes of war with the ensuing increased danger of the use of the atomic weapon by the belligerents, notwithstanding any legal prohibition, as a measure of supreme retaliation against an actual or alleged aggressor or otherwise by way of reprisals. These are matters of speculation. Arguments of this kind apply to most other humanitarian rules of the law of war—which means practically to the entire law of war. Upon analysis, the view which underlies that argument is that if only the restraints which that law imposes upon the belligerents were removed the resulting savagery of the struggle would be likely to render it a condition so terrifying as to make governments pause before embarking upon war. Such reasoning opposes what is no more than a controversial possibility to what in the light of conscience and foresight is a categorical imperative, namely, that there must be no cessation or abatement of effort to save life, to diminish suffering, and to protect the dignity of man whenever the promotion of these ends even remotely depends upon human will. That imperative could be disregarded only if it could be conclusively shown that it can be obeyed only at the clear risk of increasing the danger of war. No such conclusive proof is in the nature of things possible.

The same consideration applies to the apprehension that unless aerial bombardment of and the use of the atomic weapon against centres of population are prohibited, all other humanitarian restraints of war must, by comparison, appear negligible or futile. In the words of a former President of the Permanent Court of International Justice, who was also President of the International Committee of the Red Cross at the time when the Conventions of 1949 were being prepared, 'human life and human dignity are not values which can be measured in terms of figures and statistics'.[1] The provisions, or some of the provisions, of the four Geneva Conventions *may*—and that is sufficient—be capable of application even if humanity is subjected to the ordeal of atomic warfare and even if the conduct of the war should again be characterized by lawlessness rather than by scrupulous observance of the law. For, as the Second World War showed, the one does not necessarily exclude the other. Thus the treatment of Russian prisoners of war by Germany was unprecedented in modern

[1] Max Huber, 'Le droit des gens et l'humanité', in *Revue internationale de la Croix Rouge*, August 1952, p. 669.

times in its brutality and its planned disregard for human life—the excuse, wholly unfounded in law, being that Russia was not a party to the Geneva Convention of 1929 relating to prisoners of war.[1] Yet at the same time Germany conducted elaborate negotiations with the United Kingdom concerning the relatively trivial question of the interpretation of Article 27 of that Convention regarding the compensation payable to prisoners of war injured in the course of their employment.[2] In September 1940 she enacted a law providing for the application of the German insurance regulations to prisoners of war who suffered injury in connexion with their work.

For this reason it is to be hoped that governments and the International Committee of the Red Cross will proceed in any case with extracting every possible measure of effectiveness from the beneficent but essentially optional provisions of the four Geneva Conventions in matters such as safety zones and localities with respect to which further action is required to make them operative. Such action can be pursued *pari passu* with any efforts which may be practicable to bring about international agreement in the matter of new weapons such as the atomic weapon, pilotless aircraft, projectiles diffusing inflammatory material, and chemical and bacteriological warfare. It is true that in the past the efforts of the International Committee of the Red Cross have been limited to the humanitarian aspects of the law of war as distinguished from rules governing the conduct of hostilities and the instrumentalities of war. However, as suggested, the borderline between humanitarian and other rules is unsubstantial. With insignificant exceptions all rules of warfare are ultimately of a humanitarian character. Moreover, there would appear to be no reason why in the matter of weapons of war the initiative should not be shared with—or taken by—the Royal Government of the Netherlands which is the depositary of the Hague Conventions.

IV

It has been suggested that in the matter of aerial bombardment and atomic warfare there is little that legal principle as deduced from generally acknowledged law and practice can supply as a reason for prohibiting or drastically limiting the use of these instrumentalities of war. This is also the position with regard to other aspects of the law of war which have

[1] The International Military Tribunal at Nuremberg and various other war crimes tribunals affirmed expressly, in relation to the treatment of prisoners of war, that numerous provisions of the Hague and Geneva Conventions were merely declaratory of existing international law. See, e.g., the *German High Command Trial* (*Wilhelm von Leeb and Others*): *War Crimes Trials*, 12 (1949), p. 86; the *Krupp Trial*, ibid., p. 133.

[2] The British Government acted on the view that the provisions of the Convention were fully satisfied if prisoners of war were provided with accommodation, clothing, food, and medical or hospital treatment in respect of injuries arising out of their work. This, it was believed, was in fact treatment equivalent to that received by British workmen under British legislation.

drawn their strength from the traditional distinction between combatants and non-combatants—in particular the rules relating to attack upon merchant vessels on the high seas and the law of contraband and blockade. The London Protocol of 1930, which prohibited the sinking of merchant vessels without warning and without provision having been made for the safety of the passengers and crews, was intended to give expression to the time-honoured principle of immunity of non-combatants. It remained a dead letter during the Second World War. While 'murder of persons on the high seas' figured prominently in the Nuremberg indictment, no sentences were imposed under this head for the reason, *inter alia*, that unrestricted submarine warfare was waged by some of the Allies in certain theatres of war. The problem involved is deeper than that raised by the arming of merchant vessels for defensive purposes and by the interplay of the operation of reprisals. It touches upon the reality of any solution grounded primarily in the distinction between combatants and non-combatants. The same applies, even more emphatically, to the law of contraband which was essentially based upon the assumption of the validity of that distinction. Its unreality was apparent even before the First World War. The artificial character of the ensuing compromises—such as that limiting the application of the doctrine of continuous voyage to articles of absolute contraband—was largely responsible for the fact that the unratified Declaration of London was not acted upon, although at the beginning of the war an attempt was made to put it into operation.[1] If the practice followed by both sides to the conflict is evidence of the legal position, then the traditional law on the subject, derived as it was from the notion of a legally relevant distinction between military and civilian needs, no longer exists. The practice of two world wars was based on the view that no such sacrosanctity attaches to the civilian population at large as to make illegal the effort to starve it alongside the military forces of the enemy as a means of inducing him to surrender. According to the accepted practice in war on land the civilian population in a beleaguered fortress enjoys no such immunity.[2] The definition of economic warfare officially adopted in the terms of reference of the Ministry of Economic Warfare set up in Great Britain at the outbreak of the Second World War illustrates this aspect of

[1] For a neutral—Swiss—assessment of the inadequacy of the Declaration of London in the light of modern conditions see Duttwyler, *Der Seekrieg und die Wirtschaftspolitik des neutralen Staates* (1945), pp. 13–31.

[2] See, for instance, the provisions of the British *Manual of Military Law*—which in this respect is expressive of the generally accepted view—that if the commander of a besieged locality attempts to expel the non-combatants in order to conserve his stores, it is lawful for the besieging force to drive them back with the view to hastening surrender (paragraph 129). This rule was upheld by the United States Military Tribunal in the *German High Command Trial* (*War Crimes Trials*, 12 (1949), p. 84) where the Tribunal said: 'We might wish the law were otherwise, but we must administer it as we find it'.

the situation: 'Economic warfare is a military operation, comparable to the operations of the three Services in that its object is to defeat the enemy, and complementary to them in that its function is to deprive the enemy of the material means of resistance'.[1] The list of articles of absolute contraband, which in the First World War occupied several pages of the *London Gazette*, was reduced to about one-eighth of that length. But its brevity was only matched by its comprehensiveness. Food, foodstuffs, and clothing were proclaimed to be conditional contraband—a distinction without a substantial difference seeing that even in the First World War judicial decisions, departing from the provisions of the Declaration of London, applied the doctrine of continuous voyage to articles of conditional contraband. The result was that only a few categories of goods, such as medical supplies, tobacco, some fancy goods, and articles intended for the use of the ship in which they were found, remained as 'free goods'. The German list of articles of absolute contraband as proclaimed in September 1939 was almost a literal reproduction of the British list. It is of little consequence that the list thus published was given the complexion of retaliatory measures. In view of this there can be no question here of revising—or resuscitating—the law with the help of legal arguments drawn from the obsolete armoury of the past. The possibility must be envisaged that total war has irrevocably removed the foundations of a substantial part of this branch of the law and that juristic—or even political—efforts to give them a new lease of life may be in vain. Cases, though relatively few in number, bearing upon prize law were decided during and after the Second World War, but they were largely of a procedural and technical character and have tended to confirm rather than to cast doubt upon the disappearance of the traditional law. There is no real advantage in simplifying the fundamental difficulty, which springs from the entirely new phenomenon of the 'total' character of modern war, and in asserting that the fate which has befallen the law of contraband is due to the lawlessness of the belligerents. Such an approach may stultify the usefulness of exponents of international law. The danger of that contingency materializing may be gauged from the following passage in a paper contributed in 1912 by John Bassett Moore, an international lawyer of justly great reputation. Commenting on the fact that the Declaration of London left unsolved the question of contraband, he said: 'it will remain so either until, by an inconceivable relapse into primitive sixteenth-century conditions, all commerce with belligerents is forbidden, or until innocent articles of universal use, such as provisions, which, even when consumed by military men, are consumed by them as human beings rather than as soldiers, are, in conformity with the traditional contention of the United

[1] As cited in Medlicott, *History of the Second World War, The Economic Blockade*, vol. i (1952), p. 17.

States, put beyond reach of capture on loose and interested surmises.'[1] Yet that inconceivable relapse became a fact in the two world wars in which the United States participated as an active ally of the belligerents applying the measures in question; while the pathetic character of the reference to the innocuous nature of provisions consumed by members of the armed forces as human beings rather than as soldiers reveals the inescapable and obvious limitations of legal dialectics.[2]

At the same time, though efforts to revive the traditional law may be altogether out of keeping with the character of modern war, there may be room for conventional relaxations, of a humanitarian character, of belligerent control over the passage of certain categories of goods to his adversary. Such attempts were made in Article 23 of the Geneva Civilians Convention relating to the passage of consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians, as well as of consignments of essential foodstuffs, clothing, and tonics intended for children under fifteen, expectant mothers, and maternity cases. Article 59 of that Convention relating to the passage of certain goods to occupied territory is in the same category. The somewhat nominal character of certain of these Articles, qualified as they are by elastic provisions to be applied at the discretion of the belligerent,[3] is a reminder of the difficulties of effective regulation even in this limited sphere. Here, as elsewhere, before speaking in general terms of the revision of the law of war, we may be well advised to take into account the possibility that the foundations of the traditional law, and with it the substance of the law itself, have disappeared in respect of this branch of law and that the limits of any future legal regulation of the subject may have to be very narrowly drawn. This does not mean that, because of its limited scope, such

[1] 'Contraband', Address delivered before the American Philosophical Society on 2 February 1912 and reprinted in *The Collected Papers of John Bassett Moore*, vol. vi (1944), p. 58.

[2] The melancholy reflection prompted by Mr. Moore's statement is accentuated by a footnote, apparently appended by the Editor of the *Collected Papers*, stating that 'the comment and forecast thus made in 1912 were remarkably verified in and after August, 1914, when, although the Declaration of London had not become legally operative, attempts were made to apply it, in whole or in part, provisionally as a *modus vivendi*' (op. cit., p. 59, n. 1). Actually these attempts, which never amounted to a full acceptance of the Declaration, were abandoned in the course of the war. It is of interest, in this connexion, to note the studied moderation of the American protest, in September 1916, against the British Maritime Rights Order-in-Council of 7 July 1916. The protest stated that the rules enumerated in the Order were 'at variance with the law and practices of nations in several respects'. It is reported that the then American Secretary of State drew the attention of President Wilson to the unwisdom of adopting drastic language which the United States would find inconvenient if it were to become a belligerent. See Morissey, *The American Defence of Neutral Rights, 1914–1917* (1930), p. 140.

[3] Thus the obligation of the belligerent to permit free passage of the goods referred to in Article 23 is subject to the condition that he is satisfied that there are no serious reasons for fearing that the consignments may be diverted from their destination, that the control may not be effective, or that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of such consignments for goods which would otherwise be provided or produced by him.

regulation is of negligible importance and that the lawyer is justified in abstaining from lending his assistance in achieving it.

V

Similar considerations apply, from a different point of view but with the same result, to that part of the law of war which is connected in some respects with the question of contraband, namely, the law of neutral rights and duties. In so far as the law of the Hague Conventions on the subject was based, in the matter of supplies and loans to belligerents, on a clear distinction between the neutral state and its citizens, that law is in some respects out of date having regard to the fact—which is now the typical phenomenon—of the exercise by the neutral state of complete control over the economic life of its territory. Thus, in the words of an arbitral award rendered in 1945,[1] fuelling is a right which belligerent warships may exercise in a neutral port according to and within the limits of Hague Convention No. XIII. However, if the distribution of fuel is taken over by the neutral state, what are its obligations in the light of the traditional law according to which the neutral state as such must not itself—as distinguished from its subjects—add to the military supplies of either belligerent? Although revision of the law of neutrality in this sphere would perhaps raise no insurmountable difficulty, it is probable that even without express revision the established law of neutrality could be applied by way of a reasonable interpretation of its basic provisions in the light of new conditions. If that is so, an attempt at formal revision would be both unnecessary and, by conjuring up political difficulties inherent in all efforts at codification, would endanger its very purpose.

From a wider point of view there may be weighty objection to a renewed attempt at codification of the law of neutrality, on the traditional basis of the absolute equality of the belligerents, in a world placed, however imperfectly, under a legal system of collective security. There is, in principle, no room for neutrality as an undisputed right of states which are bound by the obligations of collective enforcement of peace. It is true that under the Charter of the United Nations there are contingencies in which neutrality is legally admissible—in particular, in cases in which there has been a failure of the legal machinery provided for ascertaining the fact of aggression and for bringing about enforcement action. However, it may be improper to regard that contingency as typical and to devote special effort to making provision for its regulation. Also, even if—because of the requirement of unanimity of the permanent members of the Security Council—there has been a failure to ascertain formally the fact of aggression and to

[1] *The Attilio Regolo and Other Vessels: Annual Digest and Reports of Public International Law Cases*, 1947, Case No. 137.

suppress it through enforcement action of the United Nations, there still remains the right of individual states to determine for themselves that a violation of the Charter has taken place and to deny the benefits of impartial conduct to the state waging an aggressive, i.e. an illegal, war. This they may do in particular in cases in which, following upon inaction of the Security Council rendered impotent by disagreement among its permanent members, the General Assembly has given the weight of its moral authority to the finding that a state has been guilty of an act of aggression.[1] With the prohibition of aggressive war—and that prohibition has now become part of the law notwithstanding the imperfections of its enforcement—the traditional law of neutrality conceived as an attitude of absolute impartiality has undergone a profound change. It may be too early to translate that change into precise legal rules. It is probably too late to impart a complexion of urgency to the attempt to give more precision and vitality to the old law of neutrality regardless of the changes brought about by parallel developments in the law. Undoubtedly, most of the rules of warfare, intended as they are to secure a minimum of humanity and good faith in the relations of belligerents, operate regardless of the legality of the war. This does not necessarily apply to rules of neutrality.[2] It would therefore appear doubtful whether the law of neutrality is at present a fit subject for revision or codification.

Conclusions

It is now convenient to formulate the main conclusions, both negative and positive, of this article. In their negative aspect these conclusions are that the occasion for and the prospect of codification of the law of war, by way of development or restatement of existing rules and principles, can be of but modest dimensions. In the first instance, the possible scope of the revision of the law of war has been considerably reduced by the simple but

[1] See the so-called 'Uniting for Peace' Resolution adopted by the General Assembly on 3 November 1950 (Doc. A/1481) which provides for appropriate action by the General Assembly in cases in which the Security Council, because of the lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security. From the point of view of the paramount purpose of the United Nations to enforce peace, that Resolution, 'though not binding, may be considered to provide authorization for action aiming at fulfilling the major purpose of the Charter' (Oppenheim, *International Law*, vol. ii (7th ed. by Lauterpacht, 1952), p. 176, n. 1.

[2] The writer of the present article has submitted elsewhere: (*a*) that a state waging an unlawful war does not obtain or validly transmit title with respect to property acquired in connexion with the conduct of war—regardless of whether such title is otherwise acquired in accordance with the law of war—and that this principle applies in particular to title claimed to have been acquired by requisition, by other forms of appropriation of public and private enemy property, or by condemnations in prize; (*b*) that it is open to and in proper cases incumbent upon neutral states, especially if bound by collective obligations to enforce the peace, to discriminate against a state waging an unlawful war and to deny to it and to its transferees title to such property (*Festschrift für Hans Kelsen* (1953)).

outstanding fact that a large part of the law of war—by far its larger part—has been revised, developed and codified on an imposing scale by the four Geneva Conventions of 1949. Secondly, it may be difficult to speak of revision of the law of war in respect of questions in which there is no agreed law to revise. This applies to some of the principal aspects of the law of war, such as aerial bombardment, atomic warfare, the conduct of war at sea in relation to merchant vessels, and the law of contraband—in all of which the distinction, traditionally regarded as fundamental, between combatants and civilians is either indisputably relevant or, in any case, already underlay the law as it was presumed to exist at the time of the Hague Conferences of 1899 and 1907. Thirdly, in view of the absence of agreement in these spheres on the importance attaching to the distinction between combatants and non-combatants and of the radical change in the character of war in scope and method, the creation of new law is substantially a matter of political decision not necessarily related to any existing generally recognized legal principles. Fourthly, it may not be conducive to the progressive international regulation, on a humanitarian basis, of these questions to represent them as being governed by any recognized rules of international law. The law on these subjects must be shaped—so far as it can be shaped at all—by reference not to existing law but to more compelling considerations of humanity, of the survival of civilization, and of the sanctity of the individual human being. This means that the part of the lawyer in shaping it must be confined within narrow limits. Fifthly, it is doubtful whether reasons of propriety permit, in the formative period of the United Nations, the codification or revision of the law of neutral rights and duties. Having regard to these considerations, it may be advisable to keep in check any tendency to strident admonitions upon the necessity to revise the law of war.

On the other hand—and these are the positive conclusions emerging from this article—there are at least three spheres, of limited compass, in which tasks both urgent and practicable claim the attention of the lawyer. In the first instance, although with regard to some major, and perhaps the most important, aspects of warfare agreed legal regulation is still a matter of the future, it is possible to subject to law what may be called the humanitarian fringe of the problems involved. Some of the provisions of the Geneva Conventions of 1949 have shown the direction in which such efforts may feasibly be attempted. Reasons have been given why it may not be permissible to treat these possibilities lightly—however limited they may be in their scope and precarious in their operation.

Secondly, with regard to the Geneva Conventions of 1949, which embody the major part of the law of war, the lawyer is confronted with the task of incorporating, in a systematic manner, their stupendous positive achieve-

ment in military manuals, in textbooks, and in international law generally. This task, which is far from being one of mere exposition, must be accomplished in a critical spirit. For the Conventions, beneficent as they are, abound in gaps, compromises, obscurities and somewhat nominal provisions resulting from the inability of the parties to achieve an agreed effective solution—occasionally to the point of the English and French texts laying down divergent rules.[1] Sustained scientific effort directed

[1] It may be useful to adduce some illustrations of the tasks which lie ahead in this respect. Thus, for instance, according to the English translation of Article 5 (2) of the Civilians Convention, certain protected persons—such as alleged spies, saboteurs, and other persons suspected of activity hostile to the Occupying Power—shall be regarded, 'where absolute military necessity so requires', as having forfeited the rights of communication provided for in the Convention. The English text of the third paragraph of that Article proceeds to lay down that 'in case of trial' such persons shall not be deprived of the rights of fair and regular trial prescribed by the Convention. The expression 'in case of trial' seems to suggest a departure from the fundamental rule of the Convention that a trial is invariably required. The French text of this paragraph uses the expression *en cas de poursuite*. The writer understands that the discrepancy is due to the fact that it proved impossible to reconcile the conflicting views on the subject. With regard to some other questions the absence of agreement has manifested itself in reservations such as those relating to Article 68 (2) of the Civilians Convention bearing on infliction of the death penalty in occupied territory, or Article 85 of the Prisoners of War Convention relating to the treatment of convicted war criminals. The important Articles of the Sick and Wounded Convention relating to the internment of medical personnel and the retention of medical stores, although they do not in fact constitute a regression from the corresponding provisions of the Convention of 1929, represent a compromise the implications of which are not wholly clear. According to the later Convention, while detained medical personnel shall not be considered as prisoners of war, they seem to have been subjected to those provisions of the Prisoners of War Convention which accrue to their benefit. The same element of only partially resolved compromise characterizes the provisions of that Convention relating to the buildings and material of fixed medical establishments (Article 33). The Convention contains no rules concerning reimbursement of the Protecting Power for its expenses, which, in a prolonged war, may be heavy. In Resolution 2 attached to the Final Act the Conference recommended for future consideration the question of the advisability of setting up an international body to take the place of the Protecting Power in case no Protecting Power should be available—one of the reasons of that contingency being, apparently, the possibility that owing to the general spread of hostilities there may be no state left to accept that rôle. The need to clarify the Convention applies also to such apparently minor matters as the protection of property of prisoners of war. While Article 18 of the Prisoners of War Convention embodies a measure of protection in this respect, the divergent practice of various states seems to reveal the desirability of more specific regulation. Thus the regulations issued in the United States by the War Department permit members of the armed forces to buy articles from prisoners of war (for the text of the relevant circular see Downey in *American Journal of International Law*, 44 (1950), p. 506). On the other hand, British military personnel are liable to punishment under military law for trafficking with prisoners of war by way of purchase, sale or barter—a rule which commends itself having regard to the obvious inequality in the bargaining capacities of the parties. In 1951, following upon a series of meetings, experts appointed by the Governments of Sweden, Norway, and Denmark issued a statement putting on record their agreement as to the interpretation of a number of Articles of the various Geneva Conventions of 1949. Thus, departing somewhat from the letter of Article 18 (3) of the Sick and Wounded Convention, they agreed that a state does not act unlawfully if it punishes as traitors nationals who have voluntarily accepted appointments and served in the medical service of the enemy. With regard to work performed by the civilian population and officials in occupied territory they agreed on the interpretation of the somewhat obscure provisions of paragraph 2 of Article 51 of the Civilians Convention in relation to Articles 31–34, paragraph 2 of Article 54, and Articles 67 and 68. They affirmed that a state threatened by invasion is entitled to order its public officials and judges to leave the threatened area notwithstanding any difficulties which an order of this nature may cause to the occupying Power.

towards the clarification and expansion of the Conventions may in itself add to their authority as the most comprehensive codification of the law of war yet in existence.

Finally, in the matter of those parts of the law of war which are not covered or which are not wholly covered by the Geneva Conventions, diverse problems will require clarification. These include such questions as the implications of the principle, which has been gaining general recognition, that the law of war is binding not only upon states but also upon individuals—i.e. both upon members of the armed forces and upon civilians; the changed character of the duties of the Occupant who is now bound, in addition to ministering to his own interests and those of his armed forces, to assume an active responsibility for the welfare of the population under his control; the consequences, with regard to appropriation of public property of the enemy, of the fact that property hitherto regarded as private and primarily devoted to serving the needs of private persons, is subjected in some countries to complete control by the state; the resulting necessity for changes in the law relating to booty; the emergence of motorized warfare with its resulting effects upon the factual requirements of occupation and the concomitant duties of the inhabitants; the advent of new weapons such as flame-throwers and napalm when used against human beings—a problem which may be postponed, but not solved, in manuals of land warfare by the suggestion that it raises a question primarily in the sphere of aerial warfare; the problems raised by the use of aircraft to carry spies and so-called commando troops; the limits, if any, of the subjection of airborne and other commando forces to the rules of warfare, for instance, in relation to the treatment of prisoners of war; the reconciliation of the obviously contradictory principles relating to espionage said to constitute a war crime on the part of spies and a legal right on the part of the belligerent to employ them; the humanization of the law relating to the punishment of spies and of so-called war treason; the prohibition of assassination in relation to so-called unarmed combat; authoritative clarification of the law relating to the punishment of war crimes, in particular with regard to the plea of superior orders and the responsibility of commanders for the war crimes of their subordinates; the regulation, in this connexion, of the question of international criminal jurisdiction; the elucidation of the law, at present obscure and partly contradictory, relating to ruses and strategems, especially with regard to the wearing of the uniform of the enemy; the effect of the prohibition or limitation of the right of war on the application of rules of war, in particular in hostilities waged collectively for the enforcement of international obligations; and many others. In all these matters the lawyer must do his duty regardless of dialectical doubts—though with a feeling of humility springing from the

knowledge that if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law. He must continue to expound and to elucidate the various aspects of the law of war for the use of armed forces, of governments, and of others. He must do so with determination though without complacency and perhaps not always very hopefully—the only firm hope being that a world may arise in which no such calls will claim his zeal.

NOTES

THE EUROPEAN POLITICAL COMMUNITY

I

THE search for a solution to the problem of the interdependence of the separate countries of modern Europe has been a persistent theme of European history since the end of the Second World War. How can the countries of Europe achieve by agreement and for the common good that co-ordination of national policies which has more than once in the past been imposed by force? Unless an agreed answer to this question can be found, there is always the danger that some other form of unity may be imposed on Europe by another conqueror by his own methods and for his own ends. Various solutions already have their advocates. The economic approach to the problem is illustrated by various attempts to co-ordinate the economic activities of different groups of states: the Benelux Agreement for a Customs Union between Belgium, Luxembourg, and the Netherlands; the creation of the Organization for European Economic Co-operation; and the institution of the European Coal and Steel Community. Preoccupation with the military factor is to be seen in the Treaty of Dunkirk, the Brussels Treaty, the North Atlantic Treaty, and the Treaty instituting the European Defence Community. An essentially political approach, on the other hand, is exemplified in the Council of Europe and the proposal for a European Political Community. With all their different systems and techniques these various developments in international collaboration in Europe constitute a significant evolution in a period of less than eight years.

To the international lawyer, these instruments and projects represent two different types. The first type incorporates the method of inter-governmental co-operation, which is exemplified particularly in the Brussels Treaty Organization, O.E.E.C., and N.A.T.O. and to some extent in the Council of Europe.[1] The essence of this method is that a group of governments agree to collaborate in a given field; they then discuss their common problems and endeavour to reach agreement on the solutions to be adopted; the execution of any agreed solutions, however, remains in the hands of the participating governments, and none of them is committed to any course of action to which it does not specifically agree. This is the traditional method of international action, which has been employed for centuries in military alliances and during the last hundred years in a number of international organizations of a rather technical nature, such as the Universal Postal Union, the International Telegraph Union, the Union for the Protection of Industrial Property, and so on.

The advantage of the method of inter-governmental co-operation is that statesmen and parliaments, when they undertake to join such an organization, know precisely what commitments they are assuming and, since unanimity of the members is normally required for important decisions, they will remain the masters of their own actions in the future. The disadvantage inherent in this method is that the corollary of unanimity is (to use an unpopular term) the veto. If any member does not agree to a given course

[1] The Council of Europe is basically an organ of inter-governmental co-operation, with the addition of a parliamentary organ of a consultative character. Though its distinguishing characteristic is the existence of the Consultative Assembly, which is a parliamentary and not a governmental body, any international action of the Council must be taken by the Committee of Ministers, which is an inter-governmental organ on traditional lines. Cf. Robertson, 'The Council of Europe as an Organ of Inter-governmental Co-operation', in *Les Institutions Internationales Européennes* (University of Strasbourg, 1952).

of action, the organization is brought to a standstill in that particular field. In cases of lesser difficulty, the process of securing unanimity is often protracted and the speed of the fleet is the speed of the slowest ship. A situation may thus arise in which the views of member governments are too divergent for agreement to be reached on any substantial action by the organization, and its usefulness becomes atrophied.

The second distinct type of post-war organization in Europe is that of the federal or supra-national authority involving the surrender to that authority by the participating governments of their powers in certain fields. There can be no doubt that there exists in many countries a growing conviction that the creation of a European federation has now become necessary. The view is held by many responsible politicians and publicists that the individual national states of western Europe no longer correspond to the economic and strategic necessities of the age and that they should be merged in some larger political unit, just as the provinces of France were eventually merged in a single kingdom, and the separate kingdoms and smaller units of Italy and Germany were united into the Kingdom of Italy and the German Empire within the last hundred years.[1] Other precedents are ready to hand in Switzerland, Canada, and Australia, though perhaps the most frequently cited is that of the United States of America.[2] It seems at times that there is mingled with this conviction an almost mystic faith in constitutions. This is hard for Englishmen to understand, for their lack of a written constitution is sometimes a source of pride. For the historically-minded continental, on the other hand, the constitution still retains something of the veneration it inspired in the nineteenth-century liberal, to whom it was the symbol of political progress, of emancipation from autocracy, or of national independence. The only comparable sentiment of the Anglo-Saxon is perhaps his veneration for Magna Carta, though the feelings of his ancestors in Stuart times would provide a better parallel. Be that as it may, a certain faith in the magic of constitutions does seem to contribute to the enthusiasm of certain continental advocates of European federation.

Another consideration of a more practical nature is that the existence of a federal or supra-national authority seems to some to offer a way out of the difficulty in which certain inter-governmental organizations find themselves on account of the rule of unanimity. Once a group of governments have surrendered certain powers to a central authority, the latter can act (within its field of competence) without having to obtain the agreement of all the participating governments to every proposal. Impatience at the slowness of inter-governmental action on traditional lines is undoubtedly a strong factor in winning partisans for federation.

The European Coal and Steel Community is the first European organization of a 'supra-national' character, the High Authority of the Community having been granted powers for the regulation of the coal and steel industries of the six participating states which were formerly vested in their national governments. The European Defence Community is the second example of this method, though the safeguards designed to protect national interests have been developed to such a point that the existence of any supra-national powers in the organs of the Community is sometimes questioned. The proposed European Political Community is a development of these two and is of

[1] It is curious to observe the development in western Europe of a tendency towards centralization by the merger of smaller sovereignties in a greater, at the same time as there is a tendency towards decentralization in the British Commonwealth by the diminution of the powers of the central authority and the near-independence of the component parts.

[2] Attention was particularly drawn to the precedent afforded by the work of the American Constitutional Convention during the 'Conference of Strasbourg' between delegations of the American Congress and the Consultative Assembly of the Council of Europe in November 1951.

particular interest to international lawyers, since it represents the greatest extension of the principle of federation which has yet been elaborated as a practical proposal for adoption by governments, the preparation having been done by an assembly of politicians, some of whom were lawyers of considerable distinction.

II. *The preliminary steps*

A large part of the history leading up to the preparation of the draft Treaty for a European Political Community was enacted in the Council of Europe.[1] When M. Schuman launched the plan which bears his name on 10 May 1950, he described it as a first step towards European federation. Three months later, when he came and explained the proposal to the Consultative Assembly of the Council of Europe on 10 August he expressed the view that it contained 'potentialities that cannot yet be fully measured, but which will rapidly lead us on towards the complete economic and political unification of Europe'. To some members of the Strasbourg Assembly this seemed to point the way out of an impasse. The Council of Europe had been founded a year before with the object of achieving 'greater unity between its members'. A considerable and influential group in the Assembly interpreted this to mean European union in the sense of some sort of federation or confederation; when the majority did not share this view, they felt that the Council was unable to achieve its foremost objective. The launching of a new plan for a supra-national authority for coal and steel as a first step towards economic and political unification gave them new hope. It was against this background that the Assembly adopted a resolution expressing its support for the initiative of the French Government and also, at the same session, a recommendation calling for the creation of a unified European army under the responsibility of a European Minister of Defence and subject to democratic parliamentary control.[2]

In the following spring the Treaty constituting the European Coal and Steel Community was signed, on 18 April 1951, by the Foreign Ministers of Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. The French Government had in the meantime, on 24 October 1950, launched the proposal for the creation of a European Defence Community. On 15 February 1951 negotiations relating to this project opened between the same six powers, and in December 1951 MM. Adenauer, de Gasperi, Schuman,and van Zeeland all addressed the Assembly on the subject, M. de Gasperi emphasizing particularly its wider political implications. While the negotiations for the E.D.C. Treaty were in progress, the urgency of creating a federal or confederal structure for Europe—subsequently known as a European Political Community—was stressed in resolutions adopted by both the French and the German Parliaments. On 27 May 1952, after the Bonn Agreements had been concluded, the Treaty instituting the European Defence Community was signed in Paris by the same Foreign Ministers who had signed the Coal and Steel Treaty a year before. The E.D.C. Treaty provided that, as an interim measure, the Coal and Steel Assembly should also act as the parliamentary organ of the Defence Community, and that it should study the constitution of a permanent Assembly elected on a democratic basis. Article 38 of the Treaty provides that the Assembly shall base its studies on the following main principles:

'. . . the permanent organisation replacing the present provisional organisation shall be so conceived as to constitute one of the elements of a subsequent federal or confederal

[1] Cf. Professor M. M. Ball, 'The Organisation of American States and the Council of Europe', in this *Year Book*, 26 (1949), p. 150; and Powell, 'The Council of Europe', in *International Law Quarterly*, 3 (1950), p. 164.

[2] *Documents of the Consultative Assembly, 1950*, Docs. 52 and 132.

structure based on the principle of separation of powers and, in particular, on a bicameral system of representation;

'The Assembly shall also examine the problems arising from the co-existence of various organisations for European co-operation which already have or may subsequently come into being, so as to ensure co-ordination within the frame-work of the federal or confederal structure.'

A decisive step had thus been taken on the road to federation—provided that the E.D.C. Treaty was ratified. However, that was likely to take some time. Furthermore, the task of studying the constitution of a democratically elected Assembly was to be allotted to the Assembly of the Defence Community, which was itself to be the same body as the Assembly of the Coal and Steel Community. Since the latter was bound to meet during the course of 1952, when the Coal and Steel Treaty had entered into force,[1] the idea gained currency that it should undertake forthwith the task which it would have to discharge later when the E.D.C. Treaty was ratified. Such was the argument put forward in the Consultative Assembly of the Council of Europe in May 1952. It led to the adoption of a resolution addressed to the six governments requesting that the task of studying the future European Political Authority should be entrusted without delay either to the Coal and Steel Assembly or to the Assembly of the Council of Europe meeting in restricted session. The provisions in this resolution concerning states which wished to be 'associated' with the work of the Political Community were directly inspired by what have come to be known as the 'Eden Proposals'. These proposals,[2] which were submitted to the Council of Europe in March 1952, contained various suggestions for using the Council as the means of preserving the links between the six states participating in the Coal and Steel Community and the Defence Community, on the one hand, and the other members of the Council of Europe, on the other hand; their aim was to prevent the division of western Europe into two blocs consisting of the 'Little Europe' of the six states embarked on the road to federation and the other states which felt unable or unwilling to join them.[3]

On 10 September 1952 the Ministers for Foreign Affairs of the Coal and Steel Community accepted the suggestion which had been made to them and invited the members of the Coal and Steel Assembly to work out a draft treaty for a Political Community, based on the principles set out in Article 38 of the E.D.C. Treaty. They proposed that this work should be completed within six months, that is to say by 10 March 1953, and that the results should be communicated to the Defence Community Assembly and to the Foreign Ministers of the six countries. Expressly declaring that their suggestions were based on the Eden proposals, they recommended that the Assembly should invite observers from the other member states of the Council of Europe and should report on the progress of its work to the Consultative Assembly of the Council.[4]

On 13 September 1952 the members of the Coal and Steel Assembly, considering that the proposal of the six Foreign Ministers 'corresponded to the wish of the peoples of Europe to see the creation of a Political Community', expressed their satisfaction at the initiative of the Ministers and decided 'to accept the invitation extended to them and to undertake as a matter of urgency the great task with which they had been entrusted'.[5]

[1] It entered into force on 25 July 1952.

[2] *Documents of the Consultative Assembly, 1952*, Doc. 11.

[3] 'The British Government proposed a plan—since known as the Eden Plan—the main purpose of which is to reconcile the supranational and international tendencies with one another'—M. von Brentano, Chairman of the Constitutional Committee, in the Consultative Assembly on 14 January 1953.

[4] Assemblée *Ad Hoc*: *Documents officiels de la Commission Constitutionnelle* (October–November 1952), Doc. 3.

[5] Ibid., Doc. 4.

As proposed by the Foreign Ministers, they invited the French, German, and Italian delegations to co-opt three additional members each, in order to bring their numbers into line with those of the E.D.C. Assembly. When undertaking its new task, and with its numbers thus augmented, the Assembly assumed the title of the '*Ad Hoc* Assembly'.

The *Ad Hoc* Assembly elected the same President and Vice-Presidents[1] as the E.C.S.C. Assembly, and adopted the same rules of procedure and secretariat.[2] It then appointed a Constitutional Committee of twenty-six members, to prepare a draft treaty for consideration at its next session. Finally, it invited the delegations to the Consultative Assembly of the Council of Europe of countries not members of the E.C.S.C. to appoint observers to participate in the work of the *Ad Hoc* Assembly and of its Constitutional Committee.[3] In March 1953 the latter produced the first text of the 'Draft Treaty embodying the Statute of the European Community'.[4] This consisted of a Draft Treaty of 117 Articles together with two Protocols, one on the Privileges and Immunities of the Community and the second on 'Links with the Council of Europe'. The Draft Treaty came before the *Ad Hoc* Assembly at its third session from 6–10 March 1953. Various modifications were made to the draft, but no major changes of substance.

III. *Summary of the provisions of the Draft Treaty*

In order to understand the provisions of the Draft Treaty, it is necessary to be familiar with the main provisions of the Treaties for the Coal and Steel Community and for the Defence Community. The essence of the E.C.S.C. Treaty[5] is the constitution of four organs: the High Authority, the Council of Ministers, the Assembly, and the Court. The High Authority is the executive organ which regulates the coal and steel industries of the six member states. The Council of Ministers represents the governments of the six countries; it must be consulted on certain subjects and, in general, secures liaison between the High Authority and the national governments. The Assembly consists of 78 members of parliament of the six countries, 18 each from France, the German Federal Republic, and Italy, 10 each from Belgium and the Netherlands, and 4 from Luxembourg. It is not, as might be supposed, the legislative organ of the Community, since the High Authority has, within limits, legislative as well as executive powers. The Assembly, however, is the organ of parliamentary control. It receives reports from the High Authority and can, by an adverse vote, force it to resign. The Court is, of course, the judicial organ of the Community; it secures observance of the Treaty by all the organs of the Community and regulates differences between the Community and third parties. The structure of the Defence Community is very similar.[6] The place of the High Authority is taken by a 'Board of Commissioners', the powers of which, however, are more limited: on a number of important questions the Board can only act with the agreement of the Council of Ministers, acting by unanimous decision. It is for this reason that it is frequently questioned whether the Defence Community is a supra-national authority; in many respects it seems that it merely provides an executive organ for inter-governmental decisions reached unanimously. The Assembly and

[1] President: M. Spaak (Belgium); Vice-Presidents: MM. Pünder (Germany), Teitgen (France), Vixseboxse (the Netherlands), Casati (Italy), and Fohrman (Luxembourg).

[2] The Secretary-General of both Assemblies is M. de Neréé tot Babberich (the Netherlands).

[3] The British observers were Lord John Hope, Lord Layton, and Mr. Alfred Robens, M.P.

[4] *Ad Hoc* Assembly (1953), Doc. 15.

[5] Cf. van Raalte, 'The European Coal and Steel Community: A Dutch View', in *International and Comparative Law Quarterly* (1952), p. 73; and Parker, 'The Schuman Plan—A Preliminary Prediction', in *International Organisation*, vol. vi (1952), p. 381.

[6] Cf. Tremport, 'Le Traité instituant la Communauté Européenne de Défense', in *International and Comparative Law Quarterly* (1952), p. 519.

Court of the Defence Community are similar to those of the Coal and Steel Community. The Assembly, however, gives another three seats each to France, the German Federal Republic, and Italy; the composition of the Court, however, is the same.

The organization of the Political Community is based on that of the Coal and Steel and Defence Communities. Indeed, the object of the Draft Treaty is not to create a third community comparable to the other two but to merge them in something greater—a 'European Community' which shall have the powers of the E.C.S.C. and the E.D.C. *plus* additional powers relating to foreign affairs and economic policy. This aspect of the matter, which is fundamental to the whole project of March 1953, is even illustrated in a change of name. For some time previously discussion had referred to a 'European Political Community', the implication being that political powers would be conferred on a third organization, the coal and steel industries and the European army being confided to the two organizations already set up. The final proposal of the *Ad Hoc* Assembly, however, bears the title simply of the 'European Community', that being an all-embracing term to cover foreign policy, defence, industry, and trade.

(*a*) *General provisions*

The Preamble to the Draft Treaty closely follows the Preamble to the Coal and Steel Treaty, and begins with the hallowed formula of the American Constitution and the Charter of the United Nations:

'*We, the Peoples* of the Federal Republic of Germany, the Kingdom of Belgium, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands. . . .

'Resolved to substitute for our historic rivalries a fusion of our essential interests by creating institutions capable of giving guidance to our future common destiny. . . .

'Have decided to create a European Community.'

Article 1 states specifically: 'The present Treaty sets up a European Community of a supranational character. The Community is founded upon a union of peoples and States, upon respect for their personality and upon equal rights and duties for all. It shall be indissoluble.'

The general aims of the Community are then defined as follows (Article 2):

(i) to contribute to the protection of human rights and fundamental freedoms;
(ii) to co-operate with the other free nations in ensuring the security of member states against all aggression;
(iii) to ensure the co-ordination of the foreign policy of member states;
(iv) to promote the economic expansion, the development of employment and the improvement in the standard of living in member states by means, in particular, of the progressive establishment of a common market;
(v) to contribute towards the achievement of the general objectives laid down in the Statute of the Council of Europe, the Convention for European Economic Co-operation and the North Atlantic Treaty.

Article 3 incorporates by reference into the Statute of the Community the rights and freedoms set out in the European Convention on Human Rights and the Protocol thereto. Under the provisions of Article 5, 'The Community, together with the E.C.S.C. and the E.D.C., shall constitute a single legal entity.'

(*b*) *The institutions of the community*

Part II of the Draft Treaty creates the institutions of the Community. These are: the

Parliament; the European Executive Council; the Council of National Ministers; the Court of Justice; and the Economic and Social Council.

The Parliament is to consist of two chambers: the Peoples' Chamber, representing the peoples of the Community, and the Senate, representing the states (Article 11). The deputies in the Peoples' Chamber are to be elected for five years by universal, equal and direct suffrage, by secret ballot, open to both men and women (Article 13). The number of deputies is to be as follows: German Federal Republic 63, Belgium 30, France 70, Italy 63, Luxembourg 12, and the Netherlands 30[1] (Article 15). France is granted 7 more deputies than the German Federal Republic and Italy, in order to take into account its overseas territories and dependencies. It was contemplated by the Assembly that the number of German deputies would be increased at such time as Eastern Germany is reunited to the Federal Republic. Senators are to be elected for five years by the national parliaments, in accordance with the procedure determined by each member state (Article 16). The number of senators shall be: German Federal Republic 21, Belgium 10, France 21, Italy 21, Luxembourg 4, the Netherlands 10. Both chambers of the Parliament are to hold two ordinary sessions annually, beginning in the second week of May and the last week of October. Provision exists for the possibility of extraordinary sessions (Article 21). Members of the European Executive Council and of the Council of National Ministers may attend the meetings of both chambers and may speak therein (Article 24).

'The European Executive Council shall undertake the general administration of the Community'[2] (Article 27). The President of the Council is to be elected by the Senate, and will appoint the other members of the Council, who are to be known as 'Ministers of the European Community'; they must be nationals of member states and not more than two of them are to be of the same nationality (Articles 28 and 29). The Council, on its appointment, must seek a vote of confidence from both chambers of the Parliament. It must resign if either chamber passes a vote of no confidence or refuses it a vote of confidence; but the Peoples' Chamber can only do so by a three-fifths majority, and the Senate by electing a new President (Article 31). If the Peoples' Chamber adopts a vote of no confidence by less than a three-fifths majority, the Executive Council has the option of resigning or dissolving the Chamber (Article 31, paragraph 4).

The President of the Council may dismiss or replace any member of the Council, subject to the approval of both Chambers (Article 32); he is to represent the Community in international relations (Article 34).

Articles 35 to 37 provide very briefly for a Council of National Ministers with the function of 'harmonising the action of the European Executive Council with that of the Governments responsible for the policies of their respective countries'. The Council is to consist of representatives of member states, who must be members of their governments. The Council of Ministers and the European Executive Council are to exchange information and consult with one another.

The Court of the Community is to 'ensure the rule of law in the interpretation and application of the present Statute and of the laws and regulations of the Community'. The Court of the E.C.S.C. and the E.D.C. and the Court of the European Community will constitute one court, thus ensuring uniformity of jurisprudence (Article 38). The Court is to have up to fifteen judges, whose method of appointment is based on that of the International Court of Justice. They are to be selected by the European Executive Council, with the approval of the Senate, from lists drawn up by the member states and

[1] Cf. *infra*, p. 394.

[2] French text: 'assure le gouvernement de la Communauté'.

by the national groups in the Permanent Court of Arbitration. The judges are to be appointed for nine years and to be eligible for re-election. The powers conferred on the Court are extensive. By Articles 41 to 45 it is given jurisdiction in the following matters:

a. Disputes between member states or between one or more member states and the Community arising out of the application or interpretation of the Statute. By a definition clause contained in Article 108 'Statute' is to be interpreted to mean the Treaty itself plus the Coal and Steel Treaty and the E.D.C. Treaty. The Court will, therefore, interpret all three.

b. Similar disputes arising out of the application or interpretation of a law of the Community.

c. Appeals from the decisions of subordinate tribunals of the Community. This is one of the more obscure provisions of the Draft Treaty, since the latter does not provide for any subordinate tribunals. There are, however, subordinate tribunals provided for in the E.C.S.C. and E.D.C. Treaties; consequently, the Court of the Community as provided for in the Political Treaty is to act as a Court of Appeal from their decisions.

d. Appeals from the decisions or recommendations of the European Executive Council or its subordinate organs, when such appeals are based on the grounds of *ultra vires*, substantial procedural mistake, violation of the Statute or abuse of power.

e. Disputes as to the validity of decisions or recommendations of the European Executive Council or of deliberations of the Council of National Ministers when such validity is questioned in a national court of a member state.

f. Disputes arising out of decisions or acts of the Community or one of its organs which affect the rights set out in the European Convention on Human Rights. However, once the European Court on Human Rights has been set up, the Court of the Community will, if necessary, postpone judgment in any case involving a question of principle in the interpretation of the Convention, so as to permit that question to be decided by the European Court of Human Rights.

The Court may also act as a Court of Arbitration (Article 47).

The last institution of the Community is to be an Economic and Social Council. It will bear little resemblance, however, to its namesake in the United Nations, since its function will be to assist the European Executive Council and the Parliament in an advisory capacity, when it is consulted (Article 50). This provision is designed to furnish a means of associating important non-governmental organizations, such as trade unions, chambers of commerce and co-operatives, with the work of the Community. It is inspired by the provision of the E.C.S.C. Treaty for a Consultative Committee. It will be left to subsequent legislation of the Community to define the membership, competence and *modus operandi* of the Economic and Social Council (Article 51). It is further provided that if the Council of Europe sets up an Economic and Social Council, the organ of the Community may form part of the corresponding organ of the Council of Europe.

Part II of the Treaty on the Institutions of the Community contains a final chapter on 'Legislation'. This provides that the Parliament may legislate through the action of both Chambers, acting by simple majority. If one-quarter of the members of the Senate so request, a second discussion of any bill shall be held in both Chambers. Thereafter, or in default thereof, a bill becomes law and shall be promulgated as such by the President of the European Executive Council. The latter may, however, within a period of eight days request the Parliament to hold a new debate (Article 52). The European Executive Council may issue regulations for the implementation of laws of the Community (Article 53). The Executive Council and the authorities of member

states are entrusted with the execution of such laws and regulations (Article 53). The Parliament also has the power of making 'Recommendations', the procedure for their adoption being the same as that for passing laws. Recommendations are to be 'binding as regards the aims specified therein, but shall leave the means of implementation to the Authorities to whom they are addressed' (Article 54).

(c) The powers and competence of the Community

Part III of the Draft Treaty deals with the powers and competence of the Community. The Community is given, in the first place, a 'general right of initiative', in making proposals to the member states with the object of attaining the aims of the Community set out in Article 2. Such proposals are to be made by the European Executive Council and may be made either on its own initiative or on the proposal of the Parliament or one of its Chambers (Article 55).

Articles 56–66 set out the arrangements whereby the Community is to take over the powers and functions of the E.C.S.C. and E.D.C. Subject to a period of adaptation of two years, during which certain transitional provisions will apply, the Parliament of the Community will replace the Common Assembly of the E.C.S.C. and of the E.D.C.; the European Executive Council will replace the Board of Commissioners of the E.D.C. and will 'supervise and direct' the High Authority of the E.C.S.C.; and the Council of National Ministers will replace the corresponding organs of the other two organizations. The position as regards the Court is less clear. Under Article 60 'the judicial power provided for in the present Statute shall be exercised by the Court of Justice of the E.C.S.C.'. Nothing is said about when that Court is to be replaced by the new Court provided for in Article 39; presumably the European Executive Council will arrange for the creation of the new Court and for the transfer of functions to it.

Chapter 3 of Part III of the Treaty deals with International Relations, and is one of the most important parts of the whole. Article 67 confers on the Community the treaty-making power 'within the limits of the powers and competence conferred upon it'. By the following Article this power is vested in the European Executive Council, though in certain cases the latter may not ratify treaties or agreements without the consent of another organ of the Community. Then comes one of the hardest and most important tasks. 'In order to achieve the general aims laid down in Article 2, the Community shall ensure that the foreign policies of Member States are co-ordinated. For this purpose the European Executive Council may be empowered, by unanimous decision of the Council of National Ministers, to act as the common representative of Member States' (Article 69).[1] The National Ministers are to arrange for mutual and permanent consultation on foreign policy, and the European Executive Council or the Parliament may make proposals on this subject (Article 70). Arrangements are to be made for common policies at international conferences; for the peaceful settlement of disputes; and for procedures of conciliation and arbitration (Article 71).

Furthermore, there is provision to the effect that member states shall inform the European Executive Council of any draft treaties or negotiations which affect the Community, and arrangements are made for settling any conflicts of interest that may result therefrom (Article 73). Finally, the Community may accredit and receive diplomatic representatives (Article 74).

The Community is to have a budget, which is to be submitted to the Parliament by the European Executive Council (Articles 75, 76). There is provision for receipts from taxes and from the contributions of member states. The methods and rates for levying

[1] Cf. *infra*, p. 395.

taxes are to be determined by the Executive Council with the approval of the Council of National Ministers and of the Parliament. The contributions of member states are to be determined by the Council of National Ministers on the proposal of the Executive Council (Articles 77–80).

The economic powers of the Community are set out in Articles 82–87. These reproduce and amplify the corresponding provision in Article 2 and provide expressly that 'the Community . . . shall establish progressively a common market . . . based on the free movement of goods, capital and persons'. Furthermore, 'the Community shall foster the co-ordination of policy in monetary, credit and financial matters'. These powers are not to be exercised for the first year of the Community's existence. During the next five years they are to be given effect by means of proposals made by the European Executive Council which are to be approved unanimously by the Council of National Ministers and by the Parliament. Subsequently, the concurrence (not necessarily unanimous) of the Council of National Ministers is required and the approval of the Parliament, including a two-thirds majority of the Senate.

In order to mitigate hardships that might be caused by the creation of the common market, there is provision for a European Readaptation Fund (Article 85), the idea of which is based on corresponding provisions in the E.C.S.C. Treaty. A further safeguard is afforded by the right of member states to appeal against any measures which they consider 'might cause fundamental and persistent disturbance to their economy' (Article 87). Finally, the member states will consult the European Executive Council before taking measures, particularly in monetary matters, which might affect the interests of other members or impede the free movement of labour and goods. In such cases the Council may make proposals, with the agreement of the Council of National Ministers, to the member states concerned (Article 87).

Within the limits of the general aims set out in Article 2 the Community may set up or exercise supervision over specialized authorities, administrative bodies, public services, or other organizations, whether subject to public or private law or to national or Community legislation. It is to enact legislation for the implementation of this Article (Article 88). This Article is intended primarily to permit the integration or association with the Community of such proposed 'Specialized Authorities' as the 'Green Pool' or Organization of Agricultural Markets, the 'White Pool' for health and medical services, and the European Transport Authority; also other more limited European projects such as that for international canals and tunnels.

(*d*) *Association of non-member states*

Part IV of the Draft Treaty deals with the association with the Community of third states. They may be either European non-member states or overseas states 'having constitutional links' with a member state or with an associated state; but they must guarantee the protection of human rights and fundamental freedoms (Article 90). Treaties of association are to involve reciprocal rights and obligations and may provide, *inter alia*, for the participation of the associated states in the Council of National Ministers and the Senate of the Community (Article 91) and in the Court (Article 92); also for joint meetings with the European Executive Council (Article 93).

(*e*) *Transitional provisions*

Part V of the Draft Treaty contains transitional provisions designed to bring the organs of the Community into existence within a little more than six months after the Treaty has come into force.

(f) General provisions

Part VI contains general provisions, some of them of considerable importance. Article 103 relates to the reunification of Germany and provides that, when this takes place, the Statute shall automatically apply to the territory of Eastern Germany. An adjustment in the number of German representatives in the Peoples' Chamber may then be made in accordance with the procedure for the amendment of the Treaty. Article 104 relates to situations in which constitutional order and democratic institutions may be in danger in a member state. The latter may, in such a case, appeal to the European Executive Council for assistance; alternatively, the Community may intervene in such cases on its own initiative, the conditions for intervention being determined by the organs of the Community within one year after the Parliament has come into being.

In conclusion, there are provisions for liaison with the Council of Europe on terms set out in a special Protocol (Article 107); a detailed procedure is laid down for the amendment of the Treaty (Articles 110–15); and accession to the Community is to be open to any member state of the Council of Europe and any other European state which guarantees the protection of human rights and fundamental freedoms (Article 116). Two Protocols are attached to the Draft Treaty. The first deals with Privileges and Immunities of the Community. For the greater part, this is on the lines which have now become traditional for international organizations. In addition, it includes provisions that the European Executive Council shall issue *laissez-passer* to the members and higher officials of the institutions of the Community, which shall be recognized as valid travel documents by the authorities of member states (Article 7); that the Community shall enact legislation defining the classes of officials to which the privileges and immunities shall apply (Article 11); and further, that the Community may enact legislation levying taxes on the salaries and emoluments paid to its officials.

The Protocol on Links with the Council of Europe provides for that 'close association' between the European Community and the other nine members of the Council which has more than once formed the subject of Recommendations by the Consultative Assembly.[1] It is so drafted that an identical Protocol, with minor amendments of form, can be appended to the Statute of the Council of Europe, thus securing the agreement of both parties to the arrangements set out therein. The Protocol provides, in the first place, that the Consultative Assembly of the Council of Europe shall consist of the Senate of the Community plus representatives of the other members of the Council on the basis at present in force. In other words, the Senate of the Community will form part of the Assembly of the Council, or will, in effect, amount to the Consultative Assembly 'meeting in restricted session'. Secondly, arrangements are made for links between the Committee of Ministers of the Council of Europe and the European Executive Council, by requiring that the latter shall be represented at meetings of the former. Article 3 then provides that the Executive Council shall make reports on the activities of the Community to the Council of Europe; and the following two Articles that the Council may make recommendations to the Community in the same way as to its own member governments and that it will consider any proposals made to it by the Community. Finally, it is provided that the two organizations will consult together on the possibility of installing their seats in the same place (Article 6), and that they may arrange to make use of common administrative services and exchange information and other data (Article 7).

[1] Cf. *infra*, pp. 397–8.

IV. *Conclusions*

This long, complex, and original document, of which only a brief summary has been set out above, gives rise to many questions and will doubtless provoke much discussion. It is impossible in the compass of this Note to do more than comment on certain salient features.[1]

(*a*) *Distribution of seats*

The system for the distribution of seats in both Chambers of Parliament is ingenious and differs markedly from the classic procedure of federal constitutions. It is common to have a lower chamber in which the seats are distributed in proportion to the population of the component states and an upper chamber where the latter are represented on a basis of equality. Had this system been adopted for the Parliament of the European Community, the proportion in the lower Chamber would have been: German Federal Republic 48, Belgium 9, France 42, Italy 47, Luxembourg 0·3, and the Netherlands 10. Thus the three small countries of Benelux together would have had fewer than half the seats accorded to one of the three big Powers, and two of the latter together could outvote the remaining four members. The system adopted of giving 70 seats to France, 63 each to Germany and Italy, 30 each to Belgium and the Netherlands, and 12 to Luxembourg produces very different results. It is based on the distribution of seats in the Defence Community Assembly,[2] which copies closely that of the Coal and Steel Assembly.[3] As a result the three Benelux countries together have more votes than any one of the bigger partners, and no two states are in a position to dominate the Assembly.

This seems a happy result and an important guarantee to the three small countries of the Benelux group against big Power domination; it is the more important by reason of the fact that a three-fifths majority is required for certain important decisions, such as a vote of no confidence in the European Executive Council (Article 31).

The same proportions are maintained in the distribution of seats in the Senate. Here the smaller countries might consider themselves at a disadvantage when they compare this arrangement with the provisions to be found in the American, Australian, and Swiss Constitutions granting equality in the upper Chamber. But it appears that they have gained in the lower Chamber what they have lost in the upper; and they have not lost very much. Between them they constitute more than a quarter of the membership of the Senate, which is the fraction entitled to call for a reconsideration of any bill (Article 52). And they will be represented on a basis of complete equality in the Council of National Ministers (Article 36) and perhaps in the European Executive Council, which cannot contain more than two nationals of any one country (Article 28). Furthermore, the maintenance of a 'weighted system' in the Senate of the Community makes possible the arrangement whereby the members of the Senate will also be the representatives of their countries in the Consultative Assembly of the Council of Europe (Article 1 of the Protocol on Links with the Council of Europe). This has an importance to which further reference will be made below.[4]

[1] In the preparation of these comments I am indebted to Mr. N. H. Salter, from whom I have borrowed a number of ideas.

[2] Under Article 33 of the E.D.C. Treaty, the Assembly is the same as the Coal and Steel Assembly with three additional delegates each from France, Germany, and Italy.

[3] Article 21 of the E.C.S.C. Treaty gives France, Germany, and Italy 18 seats each, Belgium and the Netherlands 10 each, and Luxembourg 4. This compares with 18 seats each for the three big countries, 7 each for Belgium and the Netherlands and 3 for Luxembourg in the Consultative Assembly of the Council of Europe.

[4] Cf. *infra*, pp. 397–8.

(*b*) *International representation*

A second comment to which the Draft Treaty gives rise relates to the provisions of Article 69, to which reference has already been made, that 'the European Executive Council may be empowered, by unanimous decision of the Council of National Ministers, to act as the common representative of the Member States'. This paragraph raises very wide issues affecting the international representation of the six member states, perhaps even touching on their status as persons or subjects of international law.

If the six countries of Belgium, France, Germany, Italy, Luxembourg, and the Netherlands constitute a real federation, there is little doubt that, under the generally accepted rules of international law, the federal authority of the new political structure will replace the individual states for the purposes of international representation in relation to those subjects which fall within the competence of the federal power.[1] Other powers would then treat with the European federal authority and not with the individual state governments, in the same way as they discuss international trade with the Government of the United States and not with the individual state governments of Virginia, New York, and Massachusetts. If, on the other hand, the six Powers do nothing more than create a new organ of consultation between themselves, this would not affect their international personality any more than the creation of the Council of Europe or the O.E.E.C. alters the capacity of their individual members to undertake international negotiations with third powers. Into which of these two categories does the European Community fall?

A simple and practical test case arises under the Coal and Steel Treaty, even if the Treaty for the Political Community is never ratified. The power of regulation of the coal and steel industries of the six countries having been transferred to the High Authority, can the individual states participate in international negotiations on these subjects or must the High Authority replace them for this purpose? Under the accepted rules of international law it would seem that the High Authority would have to take their place in international negotiations of this sort. Otherwise, the absurd result would supervene that the separate states could negotiate and assume commitments which they would subsequently be powerless to execute.

This problem is indeed a practical one which will probably meet with an agreed solution as the result of negotiation in the O.E.E.C. or the United Nations Economic Commission for Europe. But even if an answer is thus found in relation to coal and steel, it does not follow that the same answer will be valid in relation to the other powers conferred on the European Community under the new Draft Treaty. As regards defence matters, the powers of the executive authority are more limited and the requirement of concurrence by national ministers more extensive; the same applies with even greater force to international relations and to the economic powers conferred by the Draft Treaty. It is therefore a wise provision that in these more doubtful cases the Council of National Ministers may—and, therefore, by implication, is invited to—decide that the Executive Council should act as the representative of the Community. Indeed, in some cases the Executive Council might be forced to do so, even if no such provision were contained in the Treaty. As it is, each of the powers or functions conferred on the Community will call for careful consideration in order to decide whether or not this is a field in which the transfer of powers calls for the Executive Council to represent the member states. In cases of doubt the Court may be consulted: if it is, it will doubtless be guided by Article 6 of the Draft Treaty which provides that the powers and competence conferred on the Community shall be restrictively interpreted.

[1] See Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), pp. 165–9.

(c) Human rights

Another aspect of the Draft Treaty which raises interesting problems relates to the protection of human rights. It is obvious that this subject was one which particularly interested the men who were responsible for its preparation. Article 2 mentions in the first place among the aims of the Community: 'to contribute towards the protection of human rights and fundamental freedoms in Member States'. The following Article provides that the provisions of Part I of the European Convention on Human Rights[1] (which is the part setting out the rights guaranteed by the Convention) and those of its Protocol[2] shall form an integral part of the Statute of the European Community. Again, Article 116 makes a guarantee of the protection of human rights a condition of membership of the Community. Furthermore, Article 104 permits intervention by the European Executive Council in what would normally be considered the internal affairs of member states in certain cases when this is necessary for the purpose of 'maintaining constitutional order and democratic institutions'. This is another echo of the political rights guaranteed in the Convention and its Protocol, though it permits much more direct action than is provided for in the Human Rights Convention.

The most important reference to human rights, however, is in Article 45, which is one of the Articles relating to the powers and composition of the Court. This provides: 'Any disputes arising from a decision or measure taken by one of the Institutions of the Community, which affects the rights recognised in the Convention for the Protection of Human Rights and Fundamental Freedoms, shall be referred to the Court.' In other words, a procedure is established whereby complaints may be made against the organs of the Community before the Court of the Community, in the same way that they may be made against member states in their own courts. It is of great importance that such a procedure should be instituted, for otherwise an organ or official of the Community might infringe the provisions of the Human Rights Convention but the injured party be left with no remedy. This would result from the fact that the Community, as such, is not a party to the Human Rights Convention (even though all the six states have signed and are expected to ratify it); consequently, an act of the Community or one of its organs could not be called into question before the European Commission or the European Court of Human Rights. It is therefore necessary that the six states, when they create the Community, should at the same time take steps to subject its actions to the standards and procedure laid down in the Human Rights Convention. This they have done to some extent by the provision of Article 45 just quoted. That provision, however, is merely the first step. A complaint against an action of the Community before its own Court will be analogous to a complaint against the action of an individual state before one of its national courts. The European Convention, however, provides for appeal to the European Commission of Human Rights if an effective remedy is not granted by the national court.[3] The action before the national court, if unsuccessful, will constitute the 'exhaustion of local remedies' required by the generally recognized rules of international law, which is a prerequisite for appeal to the Human Rights Commission (ibid., Article 26).

A similar procedure is apparently contemplated as regards a complaint against an action of the Community before its Court. It would seem that this is to be regarded as an

[1] Cf. this *Year Book*, 27 (1950), pp. 145–63. [2] See ibid., 28 (1951), pp. 360–5.

[3] Under Article 24 of the Human Rights Convention, any Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the Convention by another Party. An individual may only appeal to the Commission if the state against which the complaint is lodged has made a declaration expressly accepting the right of individual petition (Article 25).

invocation of a local remedy, for the rather cryptic paragraph 2 of Article 45 of the Draft Treaty provides that an appeal lodged with the Court of the Community 'shall be deemed to be lodged in accordance with the terms of Article 26 of the Convention'. However, if this is the intention, the next step should clearly be that the injured party should have the right to appeal to the Commission of Human Rights if he does not obtain satisfaction from the Court of the Community. This, however, he cannot do because the Commission can only hear complaints against Parties to the Convention, and the Community as such is not a Party. It would therefore seem necessary to arrange for the Community to become a Party to the Convention, in order to permit complaints against it to be considered by the Commission and Court of Human Rights, once the 'local remedies' have been exhausted in the Court of the Community.

Yet a further problem arises, however, from the fact that the Court of the Community is given competence to decide whether actions of an organ of the Community infringe the provisions of the Human Rights Convention. In deciding such questions, it is clear that the Court of the Community will have to interpret the provisions of the Convention. Under the terms of Article 45 of the Convention, however, it is the European Court of Human Rights which (provided that it is created)[1] is the competent organ to decide on the interpretation and application of the Convention. There is, therefore, an obvious danger of conflicting interpretations if the Court of the Community also undertakes this same function. In order to obviate this, paragraph 3 of Article 45 of the Draft Treaty provides that if any dispute brought before the Court of the Community involves a question of principle in the interpretation of the Human Rights Convention, the Court of the Community shall postpone judgment, if necessary, until the question of principle has been settled by the European Court of Human Rights. This is a wise provision which should undoubtedly help to maintain the authority of the Court of Human Rights and avoid conflicting interpretations of the Human Rights Convention. Nevertheless, it would seem desirable that it should be completed by some complementary measure instituting a procedure whereby the Court of the Community can obtain advisory opinions from the Human Rights Court. Otherwise the situation may arise in which the Court of the Community has to postpone its decision, pending the interpretation of the Human Rights Convention by the Court of Human Rights, but the injured party would have no means of bringing his case before the Commission and Court of Human Rights, since he has not complied with the rule of exhaustion of local remedies.

(*d*) *Links with the Council of Europe*

The various provisions designed to secure effective links between the European Community and the Council of Europe have a far greater importance than might at first appear. The fundamental issue involved is not merely one of the relationship between two international organizations with certain common interests; it is something far greater than this. The question at issue is the relation between the restricted community of six states and the other free nations of western Europe, including, more particularly, the United Kingdom.

The *Ad Hoc* Assembly and its Constitutional Committee have done all in their power to associate with their work the other members of the Council of Europe. Observers from these countries were invited both to the Assembly and to the Committee, as was also the Secretary-General of the Council of Europe, and they were freely granted the

[1] The European Court of Human Rights will only come into existence if eight Parties to the Convention make declarations accepting its jurisdiction as compulsory (Article 56 of the Convention).

right to speak. The conclusions of the *Ad Hoc* Assembly in January 1953 were immediately reported to the Consultative Assembly, which met for the purpose in a special session, and the same was done with the Draft Treaty when it was adopted in the following March. This spirit of collaboration was not only an expression of sympathy by the members of the *Ad Hoc* Assembly, it was the stated policy of the six governments set out in the invitation extended to the members of the Coal and Steel Assembly by the Foreign Ministers on 10 September 1952.[1] This same policy is reflected in a number of provisions of the Draft Treaty. Accession to the Community is to be open to all member states of the Council of Europe (Article 116); if they do not wish to accede, special provision exists for concluding agreements of association with European non-member states (Article 90). The most effective link, however, is likely to be that afforded by the personal identity of the members of the Senate with the representatives of their countries in the Consultative Assembly of the Council of Europe.

One of the suggestions contained in the Eden Proposals was that the organs of the Council of Europe, meeting in restricted session, should serve as the corresponding institutions of the restricted communities. This suggestion has been taken up by the Constitutional Committee and incorporated in the Draft Treaty and its Protocol on Links with the Council of Europe. In the first place, provision is made that the Senate of the Community shall consist of eighty-seven members, subdivided in very nearly the same manner as the representation of the six states in the Strasbourg Assembly.[2] A proposal has already been made in the Council of Europe to amend its Statute so that the distribution of seats should be identical. The Draft Protocol then provides that the members of the Senate of the Community shall also be the representatives of their countries in the Consultative Assembly. Since the representatives of the six states constitute more than half the membership of the Consultative Assembly, this provision would automatically ensure that the Strasbourg Assembly would be in a position where it would be constantly informed about the work of the Parliament of the Community and be able to discuss the latter's activities with the members of its Upper House.

The Draft Protocol on Links with the Council of Europe then goes on to provide for the attendance of members of the European Executive Council at meetings of the Committee of Ministers (Article 2), for the presentation to the Council of Europe of reports on the activities of the Community (Article 3), and for the possibility of recommendations being addressed by the Committee of Ministers to the Community (Article 4).[3]

It therefore seems that all possible steps have been taken to associate as closely as possible with the work of the Community those member states of the Council of Europe who do not wish to join but who desire nevertheless to be associated with it as closely as possible.

(*e*) *Federal powers*

In the matter of federal powers, the Draft Treaty is much less revolutionary than

[1] Cf. *supra*, p. 386.

[2] The division of seats in the Senate of the Community and in the Consultative Assembly of the Council of Europe is:

	Senate	*Assembly*
Belgium	10	7
France	21	18
Germany	21	18
Italy	21	18
Luxembourg	4	3
Netherlands	10	7

[3] See further p. 393, *supra*.

might have been expected. After all the discussion of European federation which has taken place since the war, both in the Council of Europe and outside, and after the acclaim, on the one side, and the great reserve, on the other side, occasioned by the supra-national features of the Coal and Steel Community and the Defence Community, it might have been thought that the Political Community would represent another stride forward on the same road. This turns out, however, not to be the case. The Draft Treaty sets up the institutions of a federal government but does not give them the corresponding powers. The institutions are all there. A Parliament with two houses, the lower house elected by direct suffrage and the upper house representing the constituent states, as in so many federal constitutions; an Executive Council consisting of about a dozen ministers, with a President of the Council elected by one of the Chambers, and seeking a vote of investiture from both; in the third place a Court to interpret the constitution. The shadow of Montesquieu is once more with us and one believes at first that he has achieved his greatest triumph in furnishing the inspiration for a European federal government.

The belief, however, is quickly dissipated, on account of the creation of the Council of National Ministers. Perhaps it would be more accurate to speak of the 'preservation' of the Council of National Ministers, since corresponding bodies already exist in the Coal and Steel Community and in the E.D.C. Treaty. The powers conferred on the European Community would appear at first sight to be wide enough, since its functions, in addition to heavy industry and defence, relate to international relations and the creation of a common market, not to mention various other matters of lesser importance, and also include the power of taxation. Nevertheless, the organs of a federal nature—the Parliament and the Executive Council—can do little without the consent of the Council of National Ministers, and the latter is in no sense a federal organ but a committee of six ministers representing their national governments, comparable to the national Ministers in the Brussels Treaty Organization, the O.E.E.C., or N.A.T.O.

In the field of international relations, the Community has the duty of ensuring that the foreign policies of member states are co-ordinated (Article 69). The procedure to be followed in fulfilling this obligation, however, is, in the first place, by consultation in the Council of National Ministers; secondly, the European Executive Council has the right to make proposals to the Council of National Ministers; thirdly, the Parliament, acting through the Executive Council, may address proposals to the Council of National Ministers or to member governments direct. In this field, then, it will be observed that no supra-national powers are conferred on the Community. The only novelty is that the European Executive Council and the Parliament have the right to address proposals to the Ministers or direct to the governments—in much the same way as recommendations are now addressed by the Consultative Assembly of the Council of Europe to the Committee of Ministers and to the governments.

The Treaty does contain provisions which are novel in the field of international relations, but they do not involve supra-national powers. The first of these is that the European Executive Council may be empowered, by unanimous decision of the Council of National Ministers, to act as the common representative of member states in international relations (Article 69). The second such provision is an express prohibition on member states to conclude treaties which run counter to commitments entered into by the Community (Article 72). A third is an obligation to inform the European Executive Council of any draft treaties which they are negotiating or of any initiative taken by them which affects the interests of the Community (Article 73). This last provision corresponds to a power which the Consultative Assembly of the Council of

Europe has claimed for some time but has not been granted, namely, to be consulted on any projects of member states which affect the aims of the Council. What has been rejected by the fifteen member governments of the Council of Europe is now proposed, perhaps with better chances of success, to the six governments of the proposed European Community. These three provisions would enable the Executive Council to act as a sort of co-ordinating authority for the foreign policy of member states in many fields; they would not, however, grant it any of the powers of a federal government.

Again, in the field of taxation, which seems the most powerful weapon to be entrusted to the Community, the unanimous consent of the Council of National Ministers is required before the Executive Council can present to the Parliament its proposals for levying taxes (Article 78). Similarly, the contributions of member states to the expenses of the Community are, as one might expect, to be determined by the Ministers, and the Executive Council has only the power of making proposals (Article 80).

In a third field—the economic—in which the Community has the task of establishing progressively a common market among member states, the position is somewhat similar. Proposals for accomplishing this purpose are to be submitted by the European Executive Council to the Parliament, but the concurrence of the Council of National Ministers must first be obtained (Article 84). The Draft Treaty makes a distinction here between the first five-year period, when it requires that the concurrence of the Ministers should be unanimous, and the subsequent period, when this is not so. However, though the Treaty does not necessitate unanimity after the initial five-year period, it contains no provision for taking decisions by a majority vote; and the practice of other European organizations leads one to believe that the National Ministers will probably prefer to act by unanimous agreement or not at all, even though the Treaty does not compel them to do so.

It appears then, that the Draft Treaty for the European Community has not succeeded in avoiding the dilemma of a choice between the two possible solutions to the problem of the interdependence of states in the twentieth century—the two methods being inter-governmental co-operation and federation. Confronted with these alternatives but unable to chose between them, it has attempted to utilize them both; the result is a more complicated political structure than has been known hitherto. Both systems are to be found at the same time in the European Community alongside one another, as indeed they are both to be found in the Coal and Steel Community and the European Defence Community. The essential structure of the two earlier instruments is preserved, and no further advance towards federation is recorded. This much was indeed admitted by M. Spaak when he presented the Draft Treaty to the six Foreign Ministers and said: 'Our Assembly has chosen a middle path, that of setting up a Political Community of a supranational character. . . . It does not entail any fresh transfers of sovereignty.'

Does this represent a solution of the problem of inter-dependence? Probably no one would claim that it does. To the federalist, the great merit of the Draft Treaty is that it sets up the institutions of a federal government; for him, that is a great step forward, even if they are not yet endowed with the powers which he believes they should possess. Once the skeleton is thus covered with a little flesh and skin he considers, no doubt, that it should be possible to fatten it up without too much delay. And the history of Europe for the next fifty years may show a gradual extension of the powers of the European Executive Council and the Parliament—if a treaty on the lines of the present draft is signed and ratified—until we have a real federal government of what are now the six

separate countries of Belgium, France, Germany, Italy, Luxembourg, and the Netherlands. While such a development is undoubtedly possible, there is, however, a danger. The attempt to combine the two methods of federation and inter-governmental co-operation may represent a wise gesture of political conciliation; the Treaty cannot offer all things to all men, but it does offer something to each school of thought and it does institute a system of checks and balances between the different organs of the Community. On the other hand, such a system produces the danger that these checks and balances may operate so effectively as to produce stagnation. From the point of view of effective action, the European Executive Council is undoubtedly less efficient by reason of the fact that for more important decisions it requires the consent of the Council of National Ministers. The latter, on the other hand, has no executive functions and no powers of initiative. It may legitimately be feared, therefore, that the presence of both types of organ—the federal and the inter-governmental—in one and the same structure may incorporate the disadvantages of both methods, without entailing the advantages which either might afford in isolation, and thus lead to a stalemate if the situation should arise in which the two organs do not agree while neither can act without the consent of the other.

Only the future can show whether the combination of federal and inter-governmental organs in the same institution is a statesmanlike concession to the wary or a dangerous hostage to fortune which may compromise the effectiveness of the whole structure. In any event, if the Draft Treaty is accepted by the six governments and ratified by their parliaments, we shall see the birth of federal institutions in Europe, even though in rudimentary form.

A. H. Robertson

THE CASE CONCERNING RIGHTS OF NATIONALS OF THE UNITED STATES OF AMERICA IN MOROCCO[1]

Introductory

This case represents a landmark in international judicial settlement for the reason that it was the first occasion on which the United States of America had appeared before the International Court of Justice in contentious proceedings. In addition, the legal issues raised by the case were numerous and complex. Of these the most significant were those relating to the interpretation of treaties—in particular, of most-favoured-nation clauses—and those bearing on the question of the nature of obligations under customary international law. For a number of reasons it would not be feasible in this Note to try to deduce from the decision of the International Court of Justice in this case the general principles of international law in regard to these or any of the other issues raised. In the first place, the situation of fact in Morocco was so exceptional as to render any attempt to generalize from the Court's conclusions on the particular facts of this case an exercise of doubtful value. Secondly, it may not be appropriate, from the point of view of the development of international law by the Court, to consider the Judgment in this case in isolation. Many of the issues raised, particularly those relating to the interpretation of most-favoured-nation clauses, were similar to the issues raised in the hearings on jurisdiction in the *Anglo-Iranian Oil Company*

[1] *I.C.J. Reports*, 1952, p. 176.

case[1] and in the second phase of the *Ambatielos* case.[2] Only by considering the Judgments of the Court in these three successive cases as a whole would it be possible to determine with any degree of assurance the Court's basic approach to these questions.

The purpose of this Note is, therefore, to explain as succinctly as possible, first, the historical background which gave rise to this particular Franco-American dispute over Morocco; second, the immediate origin of the dispute; third, the legal issues involved in the case, as argued by the parties and contained in their formal submissions; and, fourth, the treatment of these issues by the Court and by the dissenting Judges.

I. *The historical background*

Geographically, Morocco is one unit, though politically it comprises the French Zone (area, 415,000 sq. km.), the Spanish Zone (area, 104,600 sq. km.), and the International Zone of Tangier (area, 380 sq. km.).[3] In medieval times Morocco, together with the territories now called Algeria and Tunis, was known to the Arabs as Djezira-el-Maghrib (Isle of the West) and to the Europeans as Barbary. The first Moorish Empire in this area was established in the eighth century A.D. By the middle of the nineteenth century, however, this empire was in a state of disintegration. In 1830 the French conquered the neighbouring territory of Algeria, and in 1881 they established a protectorate over Tunisia. Despite these developments, Great Britain (with the advantage of a base in Gibraltar) was at this time the Power with the greatest commercial interest and influence in Morocco. During the long embassy of Sir Drummond Hay (1844–85), there were concluded on 9 December 1856 two important British-Moroccan treaties. These were a General Treaty[4] and a Convention of Commerce and Navigation.[5] Articles 8, 9, and 14 of the General Treaty established an elaborate system for the adjudication of disputes involving British subjects. All disputes between British subjects were to be tried by the British consular courts; all disputes between British subjects and other foreigners were to be tried by such arrangements as had been made or should be made between consuls of the Powers concerned. As for disputes between British subjects and Moors, the right to try them would depend on which party was the plaintiff. If the British subject were the plaintiff, the case would be tried by the Governor or the *kadi*[6] 'according as the case may appertain to their respective Courts'; if the Moor were the plaintiff, the case would be tried by the British consular courts. The General Treaty also contained two most-favoured-nation clauses (Articles 13 and 20)[7] and an exemption of British subjects from the payment of all taxes (Article 4). Similar privileges were granted to Spain in the Treaty of Commerce and Navigation between Spain and Morocco, signed at Madrid on 20 November 1861.[8]

[1] *I.C.J. Reports*, 1952, p. 93.

[2] Ibid., 1953, p. 10.

[3] These figures are taken from *The Encyclopaedia Britannica*, vol. xv (14th ed., 1929), p. 812. The figures for the French Zone are approximate as the southern boundary is indefinite.

[4] *British and Foreign State Papers* (hereinafter referred to as *B.F.S.P.*), vol. xlvi, p. 176. See also *United States Counter-Memorial* (hereinafter referred to as *U.S.C.M.*), Annex 20. The United States Counter-Memorial together with the French Memorial (hereinafter cited as *Fr. Mem.*) is to be found in *I.C.J., Pleadings, Morocco Case* (*France* v. *U.S.A.*), vol. i (hereinafter referred to as *Pleadings*, vol. i).

[5] *B.F.S.P.*, vol. xlvi, p. 188; *U.S.C.M.*, Annex 21.

[6] A *kadi* is a religious magistrate.

[7] A further most-favoured-nation clause was included (as part of Article 1) in the Convention of Commerce and Navigation signed on the same day.

[8] *B.F.S.P.*, vol. liii, p. 1089; *U.S.C.M.*, Annex 22.

Even before concluding these important Treaties with Great Britain and Spain—indeed, as early as 1787—Morocco had entered into a similar, if less detailed, Treaty of Peace and Friendship with the United States of America.[1] In view of their importance in the case now under consideration, four Articles of this Treaty are cited below:

Article 14

'The commerce with the United States shall be on the same footing as is the commerce with Spain, or as that with the most favoured nation for the time being; and their citizens shall be respected and esteemed, and have full liberty to pass and repass our country and seaports whenever they please, without interruption.'

Article 20

'If any of the citizens of the United States, or any persons under their protection, shall have any disputes with each other, the Consul shall decide between the parties, and whenever the Consul shall require any aid or assistance from our Government, to enforce his decisions, it shall be immediately granted to him.'

Article 21

'If a citizen of the United States should kill or wound a Moor or, on the contrary, if a Moor shall kill or wound a citizen of the United States, the law of the country shall take place, and equal justice shall be rendered, the Consul assisting at the trial; and if any delinquent shall make his escape, the Consul shall not be answerable for him in any manner whatever.'

Article 24

'. . . And it is further declared, that whatever indulgences, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be entitled to them.'

The above provisions were repeated almost word for word when the 1787 Treaty was replaced by a new one in 1836.[2]

Similar treaties were concluded between Morocco and other countries. There was thus built up in Morocco a régime of extraterritorial rights of a jurisdictional and fiscal nature (usually referred to as a 'régime of capitulations' or a 'capitulatory régime'). It was also customary at this time for the diplomatic representatives and consuls of Christian Powers to take under their protection as 'protégés' certain natives of the state to which they were appointed. Although such 'protégés' were usually connected with the legation or consulate concerned, this practice was susceptible of abuse. It was in order to remove these abuses that there was concluded at Madrid in 1880 the first multilateral Convention relating to Morocco.[3] The signatory Powers were, as well as Morocco herself, Great Britain, Austria-Hungary, Belgium, Denmark, France, Germany, Italy, the Netherlands, Portugal, Spain, Sweden-Norway, and the United States of America. Russia adhered in 1881. The Convention is important, from the point of view of the later history, in that, at any rate with regard to the régime of

[1] See Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers 1776–1909*, vol. i (1910), p. 1206 (hereinafter referred to as *Malloy's Treaties*). See also *U.S.C.M.*, Annex 18.

[2] *Malloy's Treaties*, vol. i, p. 1212; *U.S.C.M.*, Annex 19.

[3] For the original French text see *B.F.S.P.*, vol. lxxi, p. 639. For an English translation see *U.S.C.M.*, Annex 31.

protection, its purpose was to generalize and equalize the rights of all the foreign Powers in Morocco. Thus the Preamble referred to 'the necessity of establishing on fixed and uniform bases, the exercise of the right of protection in Morocco, and of settling certain questions connected therewith'. Article 17 contained a statement of the most-favoured-nation principle in the following terms:

'The right to the treatment of the most favoured nation is recognized by Morocco as belonging to all the powers represented at the Madrid conference.'

The principle of equal rights among the Christian Powers interested in Morocco grew in importance as the Moorish Empire fell into ever-increasing chaos, and the question came to be not so much when would the empire collapse as who would succeed to the inheritance. From 1894 onwards, following the death of Sultan Moulay Hassan, the situation deteriorated rapidly. The French Government began to feel that a policy of exercising indirect pressure through Algeria was no longer enough, and that a more direct approach was required. For this to be possible it was necessary to prepare the ground diplomatically—a manœuvre which was carried out by concluding a series of agreements with other Powers aimed at securing their support, should it become necessary for France to act more decisively in Morocco. In 1902 an Agreement was concluded with Italy whereby France undertook not to oppose Italian action in Libya and Italy undertook not to oppose French action in Morocco.[1] A similar Agreement was concluded with Great Britain on 8 April 1904, France undertaking not to obstruct British action in Egypt and Great Britain undertaking not to obstruct French action in Morocco.[2] In the same year a Franco-Spanish Convention was negotiated in which Spain adhered to the terms of the Anglo-French Declaration, and provision was also made for a zone in which 'est réservée à l'Espagne la même action qui est reconnue à la France par . . . l'article II de la déclaration du 8 avril, 1904, relative au Maroc et à l'Egypte'.[3]

Germany, fearful of being excluded from Morocco, demanded an international conference, and the Conference of Algeciras met early in 1906. Reflecting the clash of interests which became evident at the Conference, the Act of Algeciras of 7 April 1906,[4] after referring in its Preamble to 'the threefold principle of the sovereignty and independence of His Majesty the Sultan, the integrity of his dominions, and economic liberty without any inequality', proceeded to establish a Franco-Spanish police force for Morocco under the direction of a Swiss officer. It also provided for a State Bank which, though internationally controlled, was to be subject in its operations to French company law. Finally, the Act contained chapters relating to customs matters and to public works.

On 9 February 1909 France and Germany signed a Declaration,[5] in which Germany recognized the special political interests of France in Morocco and France pledged herself once more to respect the integrity and the independence of the Moorish Empire and the principle of commercial equality in Morocco. In 1911, however, the

[1] The Agreement was secret, but is referred to in a public Franco-Italian Declaration of 28 October 1912 (*B.F.S.P.*, vol. cvii, p. 794).

[2] *B.F.S.P.*, vol. ci, p. 1053; *U.S.C.M.*, Annex 33.

[3] *B.F.S.P.*, vol. cii, p. 432; *U.S.C.M.*, Annex 34. The network of agreements was completed when, on 4 May 1913, Spain and Italy 'agreed to express their mutual intention to raise no obstacle reciprocally to the execution of such measures as they may consider advisable to introduce, Italy in Libya, and Spain in her sphere of influence in Morocco' (*B.F.S.P.*, vol. cvii, p. 947).

[4] For the original French text see *B.F.S.P.*, vol. xcix, p. 141. For an English translation see *U.S.C.M.*, Annex 32, or *British Treaty Series*, No. 4 (1907).

[5] *B.F.S.P.*, vol. cii, p. 435.

French found it necessary to send a column to occupy Fez, thus making it necessary to bring into operation the arrangements concluded in 1902–4. Great Britain gave strong support to France, and, although for a time it looked as though war might break out, Germany decided to negotiate. On 4 November 1911 there was concluded in Berlin a Franco-German Convention respecting Morocco,[1] the signatories being Kiderlen-Waechter, the German Foreign Minister, and M. Jules Cambon, the French Ambassador in Berlin. Germany undertook not to oppose French action in Morocco, even if France were to proceed 'aux occupations militaires du territoire marocain qu'elle jugera nécessaires au maintien de l'ordre', and even if the Sultan were to entrust 'aux agents diplomatiques et consulaires de la France la représentation et la protection des sujets et des intérêts marocains à l'étranger'. In return, the French Government stated that, 'fermement attaché au principe de la liberté commerciale au Maroc, il ne se prêtera à aucune inégalité pas plus dans l'établissement des droits de douane, impôts et autres taxes, que dans l'établissement des tarifs de transport'. As a *quid pro quo* France ceded to Germany some territory in the Congo region.[2] At the same time it was agreed in an Exchange of Notes between Kiderlen-Waechter and Cambon that, as soon as France had established new courts in her zone, in which German nationals would be treated 'exactement dans les mêmes conditions que les ressortissants français', Germany would agree to the abolition of the German consular courts.[3]

All obstacles having now been removed, France proceeded to negotiate with Morocco the Treaty of Fez of 30 March 1912.[4] Described as a Treaty 'pour l'établissement d'un régime régulier et l'introduction des réformes nécessaires', this Treaty (which comprised only nine Articles) made Morocco in effect a French protectorate.[5] It provided, however, that the French Government would concert with the Spanish Government regarding the latter's special interests in Morocco. The French Government soon carried out this latter undertaking and on 27 November 1912 a Franco-Spanish Convention was signed at Madrid.[6] This provided that, in the zone which it had been arranged should be the Spanish Zone, it should lie with Spain to assist the Government of Morocco with the necessary reforms; that the special status of the Zone of Tangier (which was delimited in Article 7 of the Convention) should be settled later; that the Sultan should conclude no international engagement affecting the Spanish Zone without the prior consent of the Spanish Government; and—of peculiar importance to the matter now under consideration—that the French and Spanish Governments should introduce judicial reforms in their respective zones and that, when this had been done, they should consent to their own nationals submitting to the Moroccan courts. In other words, when the necessary arrangements had been made, French nationals in the Spanish Zone and Spanish nationals in the French Zone would no longer enjoy the benefits of the system of consular jurisdiction.[7]

[1] *B.F.S.P.*, vol. civ, p. 948; *U.S.C.M.*, Annex 36.

[2] *B.F.S.P.*, vol. civ, p. 956.

[3] Ibid., p. 953; *U.S.C.M.*, Annex 36.

[4] *B.F.S.P.*, vol. cvi, p. 1023; *U.S.C.M.*, Annex 37.

[5] Article 1 provided: 'Le Gouvernement de la République française et Sa Majesté le Sultan sont d'accord pour instituer au Maroc un nouveau régime comportant les réformes administratives, judiciaires, scolaires, économiques, financières, et militaires que le Gouvernement français jugera utile d'introduire sur le territoire marocain. . . .' Article 5 provided for a French Resident-General, who would conduct foreign relations and approve and promulgate the Sultan's decrees. In Article 6 it was provided that Moroccan interests abroad would be looked after by the diplomatic and consular representatives of France and that the Sultan would enter into no international engagement without the consent of the French Government.

[6] *B.F.S.P.*, vol. cvi, p. 1025; *U.S.C.M.*, Annex 38.

[7] As regards the phrase 'French Zone' and 'Spanish Zone', it is important to realize—as stated in a letter dated 19 January 1917 from the French Ambassador in Washington to the State

Accordingly, on 7 March 1914 a Franco-Spanish Declaration was signed at Madrid, in which Spain renounced her right to capitulations in the French Zone. The words used were as follows:

'Prenant en considération les garanties d'égalité juridique offertes aux étrangers par les tribunaux français du protectorat, le Gouvernement royal *renonce à réclamer*[1] pour ses consuls, ses ressortissants et ses établissements dans la zone française de l'Empire chérifien tous droits et privilèges issus du régime des capitulations.'[2]

France, for her part, undertook to renounce her capitulatory rights in the Spanish Zone as soon as the necessary courts were established in that zone. She carried out her promise in a Declaration of 17 November 1914,[3] in which similar words were used. During the period from 1914 to 1916, France obtained from a number of other countries declarations in which those countries either adhered in general terms to one or other (or both) of the Conventions relating to the establishment of the French protectorate in Morocco[4]—such adherence being equivalent to a recognition of that protectorate—or went further and specifically renounced their capitulatory rights in the French Zone. For example, Belgium[5] and the Netherlands[6] adhered to the Franco-German Convention of 4 November 1911; Great Britain[7] adhered to that Convention and to the Treaty of Fez itself of 30 March 1912. A large number of countries, including Belgium,[8] the Netherlands,[9] and even many countries who had never had treaty relationships of any kind with Morocco,[10] renounced their capitulatory rights so far as the French Zone was concerned. Also, in 1913, the long-awaited Italian action took place in Libya, thus completing the arrangements for North Africa made soon after the beginning of the twentieth century.[11] But it was a feature of these arrangements that there should be an analogy between the position of Great Britain in Egypt and the position of France in Morocco, so that Great Britain was not prepared to surrender her capitulatory rights in Morocco until such time as there should be a general surrender by the Powers (including France) of their capitulatory rights in Egypt. This did not occur until 1937, so that Great Britain's surrender of her capitulatory rights in Morocco did not take place until 1937—and then it applied to the French Zone only.

The First World War gave France an opportunity of terminating the capitulatory rights of Germany in Morocco, and Germany formally renounced them in Article 142

Department—that 'In reality the protectorate established by France in Morocco with the assent of its ruler, covers the whole of that country, as evidenced by the terms of the Treaty of March 30, 1912 [i.e. the Treaty of Fez]. . . . The Spanish rights are mentioned in it (art. 1) as being to be defined by an agreement between the Governments, not of Morocco but of France and of Spain. Every Power, Spain included, has recognized that our protectorate was co-extensive with that area of Morocco' (*Fr. Mem.*, Annex LIX).

[1] These words are italicized because of the importance they assumed in the case now under consideration.

[2] *I.C.J. Reports*, 1952, p. 194. The reference is to the Court's Judgment in the case, subsequently referred to as 'Judgment'.

[3] Ibid.

[4] I.e. either the Franco-German Convention of 4 November 1911 or the Franco-Moroccan Treaty of Fez of 30 March 1912.

[5] *B.F.S.P.*, vol. cvi, p. 869.

[6] Ibid., vol. cvii, p. 1022.

[7] For the adherence to the Franco-German Convention see the letter from Sir Edward Grey to M. Daeschner, dated 14 November 1911, and filed as Appendix 9 to the Counter-Case of the British Government in the case of the *Nationality Decrees in Tunis and Morocco* (*P.C.I.J.*, Series C, No. 2, Second Session (Extraordinary), p. 516). For the adherence to the Treaty of Fez see *B.F.S.P.*, vol. cviii, p. 185.

[8] Ibid., vol. cix, p. 871.

[9] Ibid., vol. cx, p. 875.

[10] E.g. Switzerland, Greece, and Japan (Judgment, p. 221).

[11] See above, p. 404, n. 3.

of the Treaty of Versailles,[1] the renunciation to take effect as from 3 August 1914. The United States, however, not only declined to surrender its capitulatory rights in either the French or the Spanish Zone, but also delayed its recognition of the French protectorate until 1917. Even then, recognition was granted subject to the reservation that 'there would remain for further negotiation the question of our capitulatory and other rights in Morocco, which could be taken up in due time'.[2]

In its Advisory Opinion in the *Nationality Decrees* case, given in 1923, the Permanent Court of International Justice observed that:

'As far as Morocco is concerned, it is certain that Great Britain still exercises there her consular jurisdiction.'[3]

In 1937, however, following the Montreux Convention regarding the general abolition of capitulations in Egypt,[4] and in view of the understanding reached in 1904, Great Britain negotiated with France a reciprocal Convention for the abolition of capitulations in the French Zone of Morocco and in Zanzibar.[5]

The renunciation by Great Britain of its capitulatory rights in the French Zone—a renunciation which has not so far extended to the Spanish Zone—was bound to bring to the forefront the issue of the capitulatory rights of the United States of America. The United States was now the only Power which claimed capitulatory rights in the French Zone although, to the extent that these rights had been based on the British-Moroccan Treaty of 1856 (invoked through the most-favoured-nation clause in the Treaty of 1836 between the United States and Morocco), the United States claim to continue to exercise them was certainly weakened. In a Note dated 26 August 1937[6] the French chargé d'affaires in Washington intimated to the Secretary of State the desire of his Government to negotiate with the United States an exchange of letters in which the United States would agree to terminate the capitulatory régime which it still enjoyed by virtue of the Treaty of 1836. The Secretary of State replied on 19 October 1937[7] indicating readiness, on the part of the United States, to consider a surrender of its rights, though in a formal convention rather than in an exchange of notes. He also added the following significant words:

'I observe that in your note reference is made to Article 25 of the American-Moroccan Treaty of September 16, 1836, which provides for the termination of the Treaty upon one year's notice given by either party. In order that there may be no misunderstanding I think it is pertinent to point out that American capitulatory rights in Morocco are derived not only from the American-Moroccan Treaty of 1836 but also from other treaties, conventions or agreements and confirmed by long-established custom and usage.'

The negotiations were never proceeded with, and the Second World War intervened.

II. *The immediate origin of the dispute*

A major Franco-American conflict over the issue of the remaining capitulatory rights of the United States in Morocco was delayed by the Second World War but accelerated by the period of economic stringency which followed the end of the war. The French

[1] *British Treaty Series*, No. 4 (1919).
[2] *U.S.C.M.*, Annex 45.
[3] *P.C.I.J.*, Series B, No. 4, p. 30.
[4] *British Treaty Series*, No. 55 (1937), Cmd. 5630.
[5] Ibid., No. 8 (1938), Cmd. 5646; *U.S.C.M.*, Annex 93. See also the unsigned article entitled 'The Abolition of British Capitulatory Rights in the French Zone of Morocco', in this *Year Book*, 20 (1939), p. 58.
[6] *U.S.C.M.*, Annex 50.
[7] Ibid.

and Moroccan economies were short of dollars, and France, as the protecting Power, was not prepared to tolerate the further loss of dollars which there was reason to believe arose through the relatively unrestricted trading and exchange facilities provided in Morocco. Accordingly, on 30 December 1948, General (now Marshal) Juin, the Resident-General of the French Republic in Morocco, issued a Decree the effect of which was to subject to a system of licensing control (*contrôle par licences*) all imports for which an official allocation of currency (*attribution officielle de devises*)[1] was not required. Imports from France and other parts of the French Union were, however, exempted from the Decree, which was issued without previous consultation with the United States. The Decree placed the State Department in a difficult position. It had, on the one hand, to take into account the genuine need of France and Morocco to conserve dollars. The principle of exchange control (*contrôle des changes*), however abhorrent to American economic thinking, was one which the United States had no option but to accept in a period of acute dollar shortage and which it specifically accepted in regard to Morocco in 1944.[2] On the other hand, the Decree established a system of discriminatory control applicable to imports as such, in addition to the currency control, and the State Department was not prepared to see the need to conserve dollars used as a pretext for depriving the United States of what it conceived to be its rights in Morocco—rights which it considered it had been careful to reserve ever since the establishment of the French protectorate. The result was that, although the State Department decided on 10 June 1949[3] to agree to the Decree provisionally and without prejudice to its own legal position, its acceptance of the Decree fell short of that unequivocal acceptance to which the French Government felt they were entitled. Negotiations continued over a long period, but the difficulty of reaching agreement on this issue, as well as on a number of attendant issues, finally persuaded the French Government that the best course was to refer the matter to the International Court of Justice by means of an Application under Article 40 of the Court's Statute.[4] For the purpose of establishing the jurisdiction of the Court the Application referred to the declarations made by the Governments of France and of the United States under Article 36 (2) of the Statute of the Court[5] and to Article 10 of the Economic Co-operation Agreement, dated 28 June 1948, between France and the United States of America.[6] After France had filed a Memorial setting out her case, the United States lodged a Preliminary Objection relating, not to the jurisdiction of the Court, which it did not contest, but to the capacity in which France was proceeding. After the necessary assurances had been given that France was proceeding both on her own account and as the protecting Power in Morocco—therefore implying that the judgment would be binding on her in both capacities—the Preliminary Objection was withdrawn,[7] the case continued its normal course, and oral hearings took place in July 1952.

[1] For a lucid explanation of the system of imports not involving currency (*importations sans devises*) see the opening paragraphs of the French Memorial (*Pleadings*, vol. i, pp. 15–17). Exchange control alone, for instance, would not prevent the import of American goods into Morocco, if the exporter were willing to forgo payment for the time being in dollars or if the importer were able to finance the transaction 'illegally, either by the export of currency to Tangier, by private clearing arrangements, or especially by the purchase of foreign exchange on the parallel market (*marché parallèle*) in Paris'. According to the French authorities all these means were being used, with the result that 'this financing constituted one of the chief elements of the inflation' recorded on the 'parallel market' in Paris (*Fr. Mem.*, Annex 9).

[2] *U.S.C.M.*, Annex 70.

[3] Ibid., Annex 24.

[4] *Pleadings*, vol. i, p. 9.

[5] *I.C.J. Yearbook, 1949–50*, pp. 169 and 177.

[6] *United Nations Treaty Series*, vol. xix, No. 302.

[7] *I.C.J. Reports*, 1951, p. 109.

III. *The legal issues involved*

The submissions of the Parties. During the oral hearings the Parties made their final submissions to the Court. These may be summarized as follows:

On behalf of the French Government

(i) That the privileges of United States nationals in the French Zone of Morocco were only those resulting from Articles 20 and 21 of the Treaty of 16 September 1836; and, in particular, that the right of consular jurisdiction over disputes between United States nationals which was granted under this Treaty covered civil disputes only, and not criminal disputes.[1]

(ii) That the United States was not entitled to claim that the application of all Moroccan laws (including taxation laws) to United States nationals required the prior assent of the United States; and, in particular, that the Decrees of 28 February 1948[2] and 30 December 1948 were legally applicable to United States nationals even without the prior assent of the United States.

(iii) That, in valuing merchandise for customs purposes, the Moroccan authorities were entitled to take into account its value at the time and at the place where it was presented for customs clearance (i.e., its value in the local Moroccan market).

On behalf of the Government of the United States

(i) That United States nationals were not subject, in principle, to the application of Moroccan laws without the prior assent of the United States;

(ii) That United States nationals were exempt from Moroccan taxes, except such taxes as had been specially provided for in treaties or had otherwise been assented to by the United States;

(iii) That the application to United States nationals of the Decrees of 28 February 1948 and 30 December 1948 was a violation of the treaty rights of the United States and of international law, in so far as these Decrees were applied to United States nationals before 15 August 1950 and 11 May 1949, on which dates, respectively, the United States had assented to the application of these Decrees to its nationals;

(iv) That the jurisdiction conferred upon the consular courts of the United States by the Treaty of 1836 covered all cases (i.e. both criminal and civil) arising between United States nationals;

(v) That, by virtue of the most-favoured-nation clauses in the Treaty of 1836 and other treaties, as well as custom and usage, the consular courts of the United States were entitled to exercise jurisdiction in all cases in which United States nationals were defendants;

(vi) That, in valuing American merchandise for customs purposes, the Moroccan authorities were required by Article 95 of the Act of Algeciras not to take into account the value of the merchandise in the local Moroccan market, but should determine value by adding to the purchase value of the merchandise in the United States the expenses incidental to its transportation to the customs house in Morocco, exclusive of all expenses following its delivery to the customs house, such as customs duties and storage fees.

[1] This latter point was argued by the French Government, though not actually contained in their formal submissions.

[2] This was a Decree imposing taxes on all goods 'introduits dans la zone française', whether made there or not. For the text of the Decree see *U.S.C.M.*, Annex 92.

The submissions in respect of the application of the Decree of 28 February 1948 and the interpretation of Article 95 of the Act of Algeciras were in the form of a counter-claim.

IV. *The treatment of the legal issues by the Court and by the dissenting Judges*

The judgment of the Court. On the above submissions and counter-claim the Court delivered a carefully reasoned judgment. It found:

(i) (Unanimously) that the Decree of 30 December 1948 was not legally applicable to United States nationals without the prior assent of the United States.

(ii) (Unanimously) that the United States was entitled, by virtue of the Treaty of 1836, 'to exercise in the French Zone of Morocco consular jurisdiction in all disputes, civil or criminal, between citizens or protégés of the United States'.[1]

(iii) (By ten votes to one) that the United States was entitled, by virtue of the Act of Algeciras, 'to exercise in the French Zone of Morocco consular jurisdiction in all cases, civil or criminal, brought against citizens or protégés of the United States, to the extent required by the provisions of the Act relating to consular jurisdiction'.[2]

(iv) (By six votes to five) that the United States was not entitled to exercise in the French Zone of Morocco any consular jurisdiction other than that referred to in (ii) and (iii) above.

(v) (Unanimously) that the United States was 'not entitled to claim that the application to citizens of the United States of all laws and regulations in the French Zone of Morocco requires the assent of the Government of the United States, but that the consular courts of the United States may refuse to apply to United States citizens laws or regulations which have not been assented to by the Government of the United States'.[3]

(vi) (By six votes to five) that United States nationals in the French Zone of Morocco were not, in principle, exempt from taxes; and in particular (by seven votes to four) that United States nationals were not exempt from the application of the Decree of 28 February 1948.

(vii) (By six votes to five) that 'in applying Article 95 of the General Act of Algeciras, the value of merchandise in the country of origin and its value in the local Moroccan market are both elements in the appraisal of its cash wholesale value delivered at the custom-house'.[4]

As will have been noticed, only eleven out of the fifteen Judges participated in the Judgment, those not present including Vice-President Guerrero and Judges Alvarez, Winiarski, and Golunsky. Judges Hackworth, Badawi, Levi Carneiro, and Sir Benegal Rau joined in writing a dissenting opinion on certain points and, as the voting shows, an anonymous fifth judge would appear to have shared their dissent on most of these points. Judge Hsu Mo disagreed with the entire Court on one point connected with the Act of Algeciras. It is clear from the voting that the case was an unusually complex one. Accordingly, before the Judgment and the various dissenting views are discussed, it is desirable to state precisely what were the issues raised by the submissions of the Parties.

It has already been shown[5] that the principal issue which caused the reference of the case to the Court was that connected with the Decree of 30 December 1948. At the same time, however, it was stated that a number of other issues gave rise to the decision to refer the case to the Court. It is now time to consider these.

[1] Judgment, p. 212. [2] Ibid. [3] Ibid., p. 213.
[4] Ibid. [5] See above, p. 408.

An examination of the submissions of the Parties and of the operative part of the Judgment shows that, in the view of the Court, the following five distinct issues were involved:

Issue No. 1. The French claim that the Decree of 30 December 1948 was applicable to United States nationals in the French Zone.

Issue No. 2. The extent of the consular jurisdiction of the United States in the French Zone in disputes between United States nationals.[1]

Issue No. 3. The claim of the United States that United States consular courts had jurisdiction in all cases in which United States nationals were defendants, and the associated claim that United States nationals were not subject, in principle, to the application of Moroccan laws, unless these laws had received the assent of the United States.

Issue No. 4. The claim of the United States that United States nationals were generally exempt from Moroccan taxation and, in particular, from certain consumption taxes contained in the Decree of 28 February 1948.

Issue No. 5. The difference over the interpretation of Article 95 of the Act of Algeciras.

The above issues may be further classified as follows:

Class A. Issues relating to the capitulatory rights of the United States;
Class B. Issues relating to the economic rights of the United States.

Into Class A must be placed the question of the extent of the consular jurisdiction of the United States in disputes between United States nationals (Issue No. 2); the claim of the United States that United States consular courts had jurisdiction in all cases in which United States nationals were defendants, and the associated claim concerning the exemption of United States nationals from the application of Moroccan laws unless the United States authorities had signified their assent to these laws (Issue No. 3); and Issues Nos. 1 (Decree of 30 February 1948) and 4 (Decree of 28 February 1948), in so far as the determination of these issues depended upon the determination of Issue No. 3. Into Class B must be placed, primarily, Issue No. 5—that concerned with the interpretation of Article 95 of the Act of Algeciras—and also Issues Nos. 1 and 4 in so far as it was arguable that, even if there were no general right on the part of the United States to claim exemption for their nationals from the application of Moroccan laws, the Decrees of 30 December 1948 and 28 February 1948 were not applicable to United States nationals for some specific reason.

Class A. *Issues relating to the capitulatory rights of the United States*

Issue No. 2. *The extent of the consular jurisdiction of the United States in disputes between United States nationals.*

The French Government argued, though without much force, that:

'L'article 20 du traité de 1836 établit un système de juridiction consulaire limitée aux litiges *civils* entre citoyens ou protégés des Etats-Unis.'[2]

It was argued that, in criminal cases, the right of the United States consul was limited to that of being present at the trial of the United States citizen or 'protégé' concerned.[3] The Court, however, unanimously rejected this contention, emphasizing that, having

[1] For this purpose 'nationals' includes both 'citizens' and 'protégés'.
[2] *Pleadings*, vol. ii, p. 170. [Italics added.]
[3] See Article 21 of the Treaty of 1836, p. 403 above.

regard to the other treaties concluded by Morocco in the pre-1836 period and to the fact that at that time there was no clear-cut distinction between civil and criminal matters in Morocco, it was evident that the word 'dispute' in Article 20 of the Treaty of 1836 covered criminal as well as civil cases.

Having considered this simple question of the interpretation of the Treaty of 1836, it is now necessary to examine, in succession, the various United States contentions in regard to Issue No. 3.

Issue No. 3. *The United States claim to consular jurisdiction in all cases in which United States nationals were defendants, and the associated claim that United States nationals were not subject, in principle, to the application of Moroccan laws unless these laws had received the assent of the United States.*

These claims were based on the following grounds, which will now be examined in turn.

(i) *The most-favoured-nation clauses independently of any other treaty*

The most-favoured-nation clauses on which the United States could rely were those contained in its bilateral Treaty of 1836 with Morocco (Articles 14 and 24)[1] and in the multilateral Madrid Convention of 1880 (Article 17).[2] The United States did not dispute that

'. . . as a matter of general principle, in modern practice, the most-favoured-nation clause does not continue in force rights acquired only through its effect, after the termination of the treaty which contained such rights'.[3]

It was argued, however, that in the case of treaties with Mohammedan countries like Morocco, where law was essentially personal rather than territorial, the normal practice did not apply and that the clause must be understood as 'permanently incorporating by reference the rights already granted to other States'.[4] The French Government had little difficulty in showing the lack of any foundation for such an argument and in drawing attention to its inconsistency with the very purpose of the most-favoured-nation clause, which is 'égaliser un régime juridique et non pas à perpétuer un régime spécial en faveur d'un Etat'.[5] The Court—apparently without dissent on this point—accepted this French contention and so did not need to consider a second French argument to the effect that the United States could not invoke, in support of its general claims regarding consular jurisdiction, a most-favoured-nation clause in a Convention which was concerned with the right of protection (i.e. Article 17 of the Madrid Convention).[6]

The United States put forward certain further arguments based on the most-favoured-nation clauses. These were designed to show that, if the United States could not exercise capitulatory rights in the French Zone, it would not be in the position of a

[1] See above, p. 403. Article 24, which referred to 'trade *or otherwise*', was drafted in considerably wider terms than Article 14, which referred simply to 'the commerce with the United States'. Prima facie it would seem that, of these two most-favoured-nation clauses, only Article 24 was so drafted as to attract, for the benefit of the United States, the full range of the capitulatory rights granted by Morocco to Great Britain and Spain in the Treaties of 1856 and 1861 respectively.

[2] See above, p. 404.

[3] *Pleadings*, vol. i, p. 372.

[4] Ibid., p. 375.

[5] *Pleadings*, vol. ii, p. 163.

[6] Judgment, p. 191. For some interesting views concerning the operation of the most-favoured-nation clause in international law see the dissenting opinions of Judges Hackworth and Levi Carneiro in the *Anglo-Iranian Oil Co. Case* (*Jurisdiction*) (*I.C.J. Reports*, 1952, p. 93, at pp. 138–140 and 157 respectively).

most-favoured nation. Such a situation would arise, it was said, because Great Britain continued to exercise capitulatory rights in the Spanish Zone and

'The United States, which treats Morocco as a single country, is entitled under the most-favoured-nation clause in Article 24 of its Treaty to the same jurisdictional rights which Great Britain today exercises in a part of Morocco by virtue of the Treaty of 1856.'[1]

This argument satisfied the dissenting Judges (subsequently referred to as 'the minority'),[2] but the Court rejected it on the ground that, if the United States could exercise capitulatory rights in the French Zone and Great Britain could not, the result

'. . . would be contrary to the intention of the most-favoured-nation clauses to establish and maintain at all times fundamental equality without discrimination as between the countries concerned'.[3]

It was also argued by the United States that France herself continued to enjoy capitulatory rights in the French Zone through the courts instituted in Morocco on the initiative of the French authorities for the purpose of exercising jurisdiction over foreigners. Of these courts—known officially as the 'tribunaux français du Maroc'—the United States Agent said:

'No criticism of any kind is intended, but the fact remains that they are French courts, they are an integral part of the French judicial system, and they are staffed with judges and officials appointed by the French Government. In fact, therefore, France is still exercising extra-territorial jurisdiction in Morocco, and the United States, under Article 24 of its Treaty,[4] is entitled to a similar right.'[5]

The Court dismissed this serious, if delicate, contention rather summarily, simply stating:

'But the tribunals of the Protectorate in the French Zone are not in any sense consular courts. They are Moroccan courts, organized on French models and standards, affording guarantees of judicial equality to foreigners.'[6]

It is submitted with respect that these two brief sentences do not do justice to the serious attention which the Court evidently gave to this matter. The Court considered the matter sufficiently important to warrant asking a question of both Agents concerning the operation of these courts, and the answer of the French Agent to this question is full of interest.[7] The minority, also without going into the matter at length, accepted the United States contention.[8]

(ii) *The Spanish-Moroccan Treaty of 1861*

As regards this Treaty, which the United States sought to invoke (through the most-favoured-nation clauses in the Treaty of 1836) as a source of capitulatory rights, the French argument was that Spain had renounced in 1914, as finally as did Great Britain in 1937, her claim to exercise capitulatory rights in the French Zone. The United States, however, contended that Spain's rights still existed *de jure*, even if they were not at present being exercised *de facto*. It was said, first, that the arrangements made between France and Spain in 1914 were a purely Franco-Spanish affair to which Morocco was not a party; secondly, that Spain had not finally given up her rights but

[1] *Pleadings*, vol. ii, p. 286. [2] Judgment, p. 222. [3] Ibid., p. 192.
[4] I.e. the Treaty of 1836 between the United States and Morocco.
[5] *Pleadings*, vol. ii, p. 287. [6] Judgment, pp. 192–3.
[7] *Pleadings*, vol. ii, pp. 326–9. [8] Judgment, p. 222.

had merely given a conditional undertaking (which she could denounce) not to claim them. The Court agreed with the French Agent that the first of these contentions was merely an 'argument de forme'[1] and rejected it, saying that, in concluding with Spain the Convention of 1912 and the Declarations of 1914,[2] France was acting on behalf of Morocco in accordance with the provisions of the Treaty of Fez.[3] The Court also rejected the second United States contention (based on the words '*renonce à réclamer*'[4]) that Spain had not finally given up her rights. It found that these words must be regarded as an out-and-out renunciation of the capitulatory rights and privileges. This view, it held, was confirmed by taking into account the declarations made by many other states 'for the surrender of their jurisdictional and other extraterritorial rights', no fewer than seventeen of which used the very expression '*renonce à réclamer*'.[5] The minority, on the other hand, accepted both these United States contentions.[6]

(iii) *The Madrid Convention of 1880*

We have already seen that the United States was unsuccessful in its attempt to rely on the most-favoured-nation clause (Article 17) of the Madrid Convention.[7] The United States, however, invoked this Convention in another way. It was said that

'The Convention of Madrid confirmed the régime of consular jurisdiction applicable to protégés. *A fortiori* that Convention ratified and confirmed the same régime of jurisdiction for the nationals of foreign Powers, for whom the benefit of the right of protection existed in the first place. . . . The Convention of Madrid incorporated and confirmed the jurisdictional régime enjoyed by all of the foreign countries in Morocco at the time that Convention was entered into.'[8]

According to this view, it was not sufficient to interpret the Madrid Convention simply by reference to its text alone. Regard must be had to the fact that, although it related to the question of 'protégés', it was signed or adhered to by some Powers (e.g. Germany, Portugal, Sweden-Norway, and Russia) who had not previously entered into treaty relations with Morocco at all. Either, therefore, the Convention was proof that these Powers (and, therefore, all the signatory Powers, including the United States) must be assumed to have acquired capitulatory rights in Morocco through custom and usage—which is a different argument[9]—or the Convention, regarded in its context, must be understood to have incorporated and confirmed the capitulatory régime for the benefit of all the signatories. These arguments satisfied the minority,[10] but the Court held that, although the Madrid Convention 'presupposed the existence' of a capitulatory régime, it actually 'dealt with the special position of protégés'.[11] Consequently, to find in the Convention a juridical basis for the capitulatory régime would be to 'go beyond the scope of its declared purposes and objects' and 'would involve radical changes and additions to the provisions of the Convention'.[12]

(iv) *The Act of Algeciras of 1906*

Somewhat similar issues were raised by the United States argument based on the Act of Algeciras of 1906, although it is necessary to consider these at greater length. It was emphasized that the Act—78 of the 123 Articles of which deal with some aspect of capitulations—'further ratified and confirmed the jurisdictional régime which

[1] *Pleadings*, vol. ii, p. 168.
[2] See above, pp. 405–6.
[3] Judgement, p. 193.
[4] See above, p. 406.
[5] Judgment, p. 195.
[6] Ibid., pp. 225–6.
[7] See above, pp. 412–13.
[8] *Pleadings*, vol. ii, p. 282.
[9] See below, p. 417.
[10] Judgment, p. 219.
[11] Ibid., p. 196.
[12] Ibid.

existed at the time'.[1] The United States contentions with regard to the Act of Algeciras, however, did not stop at this point, but were of a more fundamental character. The Act was described as 'the keystone of the treaty structure of Morocco' and as 'Morocco's constitution and charter'.[2] Finally, at the end of his speech, the United States Agent said:

'In concluding the oral presentation of its case, the United States would like to reiterate what it regards as the real issue in this case. The real issue is whether the principles of the Act of Algeciras will continue to guide the destinies of Morocco. . . . The framers of the Act of Algeciras intended to lay down certain dynamic principles which could guide the growth of Morocco as a modern State. They intended to make the Act of Algeciras the constitution and charter for the growth of a modern Morocco.'[3]

In view of the historical background to the Act of Algeciras[4] it can hardly be denied that the minority, which accepted the United States thesis in its entirety, was right in attributing great importance to the Act. From what they referred to as the 'fundamental' character of the Act, the minority concluded that

'. . . in interpreting the Act due effect must be given not only to its express provisions but also to the underlying implications which lend coherence and meaning to the express provisions. Otherwise the entire structure of the Act may be undermined.'[5]

The minority pointed out that, if effect were given only to the express provisions of the Act, strange anomalies would result. For example, actions against United States nationals by the State Bank of Morocco must, under Article 45 of the Act,[6] continue to be brought before the United States consular courts; but not other civil actions brought by Moroccans or by foreigners. The Court, however, applying to the Act of Algeciras the same canons of interpretation which it adopted towards the Madrid Convention (or would apply, apparently, to any other treaty), considered that, although the Act 'presupposed the existence' of the régime of capitulations, to hold that it actually incorporated or confirmed this régime would

'. . . involve a transformation of the then existing treaty rights of most of the twelve Powers into new and autonomous rights based upon the Act. It would change treaty rights of the Powers, some of them terminable at short notice, e.g., those of the United States which were terminable by twelve months' notice, into rights enjoyable for an unlimited period by the Powers and incapable of being terminated or modified by Morocco. Neither the preparatory work nor the Preamble gives the least indication of any such intention. The Court finds itself unable to imply so fundamental a change in the character of the then existing treaty rights as would be involved in the acceptance of this contention.'[7]

At first sight it may appear that the Court's approach to so important a treaty as the Act of Algeciras was unduly legalistic, and that the minority showed not only more historical sense but also more practical common sense. But appearances may be deceptive. It is easy after the event to refer to the Act in broad and sweeping terms as containing 'dynamic principles which could guide the growth of Morocco as a modern State', and as being 'the constitution and charter for the growth of a modern Morocco'. It would, however, be just as easy—and possibly more accurate historically—to regard the Act of Algeciras as an *ad hoc* arrangement, as an artifice contrived by the pre-

[1] *Pleadings*, vol. ii, p. 283.
[2] Ibid., p. 262.
[3] Ibid., p. 291.
[4] See above, p. 404.
[5] Judgment, pp. 216–17.
[6] This Article provided that actions instituted by the Bank in Morocco should be tried before the consular court of the defendant.
[7] Judgment, p. 198.

1914 diplomacy to reconcile, in so far as they were reconcilable, the interests of the Sultan with the 'special interests' of a number of Powers. It certainly would not be true to history to divorce the Act of Algeciras entirely from the French protectorate, because at least four of the signatories of the Act were already committed to the principle of such a protectorate. Moreover, the language used by the United States in regard to the Act tended to defeat its own purpose because, if indeed it were true that the Act was 'the constitution and charter for the growth of a modern Morocco', then it was legitimate to point out, as the French Memorial did, that one of the basic principles inscribed in the Preamble of the Act was 'the sovereignty and independence of His Majesty the Sultan'—a principle perhaps not ultimately reconcilable with a régime of capitulations.[1] Alternatively, the divergence between the Court and the minority as regards their approach towards the interpretation of the Act of Algeciras may be regarded as one facet of a more basic divergence between differing schools of treaty interpretation.[2]

With regard to the interpretation in detail of the Act of Algeciras (in so far as that Act contained Articles specifically providing for consular jurisdiction in certain cases[3]), the Court ruled by ten votes to one that it entitled the United States 'to exercise in the French Zone of Morocco consular jurisdiction in all cases, civil or criminal, brought against citizens or protégés of the United States, *to the extent required by the provisions of the Act relating to consular jurisdiction*': although, by six votes to five, it rejected the principal claim of the United States that United States consular courts were entitled to exercise jurisdiction in all cases in which United States nationals were defendants.[4] Judge Hsu Mo alone thought that:

> 'When . . . consular jurisdiction in its full form ceased to exist in respect of all the signatory States to the Act of Algeciras, the basis for the application by the various consular tribunals of the measures of sanction provided in that Act disappeared, and the ordinary rules of international law came into play.'[5]

From a practical point of view it is impossible not to sympathize with this statement, which sweeps away the anomalies to which both the Court and the minority referred and which produces a tidier juridical result than does the judgment of the Court. Legally, however, Judge Hsu Mo's solution appears to go beyond the principles of treaty interpretation which the Court has laid down on this and on other occasions.

(v) *Custom and usage*

The final ground on which the United States contended that its consular courts were entitled to exercise jurisdiction in all cases in which United States nationals were defendants was custom and usage. It was argued that, all through the nineteenth century, the capitulatory privileges of the United States in Morocco rested not exclusively upon the most-favoured-nation clauses in the Treaties of 1787 and 1836 and upon the later treaties, but also upon custom and usage, irrespective of any treaty, and that, since the United States had never renounced its customary rights, these remained in existence. The Court, however, came to the conclusion that 'throughout this whole period, the United States consular jurisdiction was in fact based, not on

[1] *Pleadings*, vol. i, p. 76.

[2] For an analysis of these differing views of treaty interpretation—as expounded in the International Court of Justice itself and in its predecessor—see Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points', in this *Year Book*, 28 (1951), p. 1, at pp. 7 and 8.

[3] E.g. Article 45 (see above, p. 415, n. 6).

[4] Judgment, p. 212.

[5] Ibid., p. 214.

custom or usage, but on treaty rights',[1] and that, although it was true that some of the Powers represented at Madrid and Algeciras had never had treaty relations with Morocco and that these Powers, as well as other Powers in a similar position, had renounced their capitulatory rights in Morocco, this was 'not enough to establish that the States exercising consular jurisdiction in pursuance of treaty rights enjoyed in addition an independent title thereto based on custom or usage'.[2] The minority, on the other hand, considered that 'usage', which was only another word for 'agreement by prolonged conduct, which may be no less binding than agreement by the written word', had been at work all the time supplementing the treaties and that it was neither possible nor practical 'to isolate and assess separately the contribution made by each of these sources'.[3] There was, therefore, a basic divergence of view between the Court and the minority—a divergence which it is beyond the scope of this Note to examine—on the question whether the existence of treaties conferring certain rights on the United States did or did not preclude the United States from claiming the same rights by virtue of custom and usage.

A further United States contention was that, even if it were held that the existence of the treaties (particularly the Treaties of 1836 and 1856) made it impossible for the United States to invoke custom and usage as a source of capitulatory rights before 1937, nevertheless, custom and usage could be so invoked after that date, when Great Britain had renounced her rights and when—if the French interpretation were right—the most-favoured-nation clause in the Treaty of 1836 was no longer of any avail to the United States. This contention was supported by evidence designed to show that, even after 1937, France had considered herself legally bound to extend capitulatory privileges to the United States in Morocco. It was urged, for instance, that, despite the clear warnings given in the Secretary of State's Note of 19 October 1937 to the effect that the United States still claimed openly to rely on 'long-established custom and usage',[4] the French authorities in Morocco continued to bring charges against United States nationals before the United States consular courts and to submit Moroccan legislation to the United States authorities for their approval.[5] The French Government admitted that this had been done, but contended that it was only as part of *une simple pratique*, which in no way prejudiced France's legal rights and which was to be explained as an act of courtesy pending the completion of negotiations (for which France had made plain her desire) designed to terminate altogether the capitulatory rights of the United States (such as they were) still enjoyed by virtue of the Treaty of 1836.[6] On this question, as on the question whether the capitulatory rights of the United States could be said ever to have been based on custom and usage, the Court and the minority were in sharp disagreement. It may be, however, that the disagreement between the Court and the minority on this question—unlike the disagreement on the other question—was one not so much of principle as of the application of the principle to the facts. The Court considered that France had made it sufficiently clear since 1937 that she reserved her legal position, and that the situation which had developed in regard to consular jurisdiction and to the practice of submitting Moroccan laws to the United States authorities for approval was 'in the nature of a provisional situation acquiesced in by the Moroccan authorities'.[7] The minority, on the other hand,

[1] Judgment, p. 199.
[2] Ibid., p. 200.
[3] Ibid., p. 220.
[4] See above, p. 407.
[5] *Pleadings*, vol. i, p. 390; see also *Pleadings*, vol. ii, p. 289.
[6] *Pleadings*, vol. i, pp. 73–75.
[7] Judgment, pp. 200–1.

considered the 1937 diplomatic correspondence to be decisive evidence against France, and they drew the conclusion that

'the French Government knew in 1937 that the United States was asserting usage as at least one legal basis of its rights, and in spite of this knowledge, the French Government continued the old practice *without any reservation*.'[1]

The associated claim in respect of 'the right of assent'. It is now time to pass from the issue of consular jurisdiction to what has been referred to as 'the associated claim that United States nationals were not subject, in principle, to the application of Moroccan laws, unless these laws had received the assent of the United States'.[2] The Court, after saying that this issue was linked with the question of capitulations, emphasized that the so-called 'right of assent' was not specifically covered by any of the treaties but was merely a corollary of the system of consular jurisdiction. The practice of submitting Moroccan laws to the assent of foreign Powers had grown up because, under the capitulatory régime, such laws were only enforceable through the consular courts, which naturally would not give effect to Moroccan laws unless the foreign Power concerned had made them part of its own law binding on the consul in his judicial capacity. The Court proceeded to illustrate with admirable clarity—and apparently with unanimity on this issue—how, so far as the United States was concerned, the problem could arise in three ways, which it was best to consider separately.

The first way was in cases where the application of a Moroccan law to United States nationals would be contrary to the treaty rights of the United States. In such cases the application of Moroccan laws, unless assented to by the United States, would be contrary to international law. The second way was in cases where the co-operation of the consular courts was, by virtue of a treaty, required in order to enforce Moroccan laws. In such cases, regardless of whether the application of the laws *qua* laws would contravene treaty rights, the assent of the United States would be essential to its enforcement by the consular courts. The third way was in cases where the application to United States nationals, otherwise than by enforcement through the consular courts, of Moroccan laws which did not violate any treaty rights of the United States, was in question. In such cases the assent of the United States authorities was not required. Accordingly, and subject to the foregoing qualifications, the Court held that:

'the United States is not entitled to claim that the application of laws and regulations to its nationals in the French Zone requires its assent'.[3]

In the light of this finding, Issues Nos. 1 (Decree of 30 December 1948) and 4 (Decree of 28 February 1948) need not be considered under Class A: they can be considered exclusively under Class B.

Class B. *Issues relating to the economic rights of the United States*

It has been shown above[4] that the following issues should be included, either wholly or partially, under this head: first, Issue No. 1 (Decree of 30 December 1948); second, Issue No. 4 (Decree of 28 February 1948); and third, Issue No. 5 (Article 95 of the Act of Algeciras). Of these, only Issue No. 5 was wholly a question of economic rights. It will be convenient, therefore, to consider this issue first.

Issue No. 5. *Article 95 of the Act of Algeciras*

The United States argued that France had embarked upon a course of misinterpret-

[1] Judgment, p. 221. [Italics added.]
[2] See above, pp. 411–12.
[3] Judgment, pp. 202–3.
[4] See above, p. 411.

ing Article 95 of the Act of Algeciras as a further measure of discrimination against American imports in addition to the Decree of 30 December 1948. It was said that Article 95 provided that American goods should be valued for customs purposes on the basis of their wholesale price in the United States, together with transport and insurance charges; and, therefore, that it was a breach of the Article for the Moroccan customs authorities to take into account in any way for valuation purposes the value of the imported goods on the local Moroccan market. The French Government considered, however, that no violation of the Article was involved by valuing the merchandise 'at the time and at the place where it is presented for customs clearance', i.e. its value in the local Moroccan market. Basically, the controversy centred on the following words in the original text of the Article:

'*Les droits* ad valorem *seront liquidés suivant la valeur au comptant et en gros de la marchandise rendue au bureau de douane, et franche de droits de douane et de magasinage.*'

The Court considered this text ambiguous and sought to remove the ambiguity by reference both to the preparatory work and to the subsequent practice, but in neither source did it find any clear indication such as would remove the ambiguity entirely. It accordingly held that the value of the merchandise in the country of origin and its value in the local Moroccan market were both elements to be taken into account.[1] The minority, on the other hand, found that there was no ambiguity and that the text clearly supported the United States interpretation.[2]

Issue No. 4. *The Decree of 28 February 1948*

As already shown,[3] the determination of this issue depended partly upon the determination of the general question whether the Moroccan authorities could enforce against United States nationals any legislation to which the United States had not assented. The determination of the question whether the practice of collecting taxes from United States nationals under this Decree up to 14 August 1950, when the United States consented to their collection, was or was not valid depended also, however, upon an examination of the treaty position specifically relating to the exemption of United States nationals from Moroccan taxes. On this point, as on the subject of consular jurisdiction, the United States put forward the contention that the obligation on the part of Morocco to exempt United States nationals from taxation was rooted in the most-favoured-nation clause in Article 24 of the Treaty of 1836. In conjunction with the tax immunity granted to Great Britain in the General Treaty of 1856 and to Spain in the Treaty of 1861, this clause was said to 'incorporate permanently', for the benefit of United States nationals, a right of exemption from Moroccan taxes. Secondly, even if the most-favoured-nation clause did not have this permanent effect—and we have seen that, in the Court's view, it did not—it was argued, as in the case of consular jurisdiction, that Spain had not totally and finally abrogated her rights. For reasons already discussed, the Court rejected this view also. A further claim to tax immunity was based on the Madrid Convention and on the Act of Algeciras, but, again, as in the case of consular jurisdiction, the Court was unwilling to hold more than that these multilateral Conventions, while 'presupposing the existence of' the principle of tax immunity, did not provide any 'new and independent legal basis for exemption from taxes'.[4] Yet a further argument was tried. It was said that, under certain provisions of the Convention of Commerce and Navigation of 1856 between Great Britain and Morocco—which were still in force—British nationals were exempted from taxation, and that United States

[1] Judgment, pp. 208–13.
[2] Ibid., pp. 228–9.
[3] See above, p. 411.
[4] Judgment, p. 206.

nationals should also enjoy such exemption by virtue of the most-favoured-nation clause (Article 24) in the Treaty of 1836. The provisions in the Convention of 1856 relied upon were contained in Articles 3, 7, 8, and 9, and related to the exemption from taxes and duties of goods exported from or imported into Morocco, or of goods conveyed from one Moroccan port to another. The Court pointed out, however, that the consumption taxes payable under the Decree of 28 February 1948 were, according to Article 8 of the Decree, payable on all products 'introduits dans la zone française de Notre Empire aussi bien que sur ceux qui y sont fabriqués ou obtenus'.[1] Such consumption taxes, said the Court, in a passage of general interest,

'can not, therefore, be assimilated to the particular taxes mentioned in the articles of the British Commercial Treaty, invoked by the United States, nor can they be considered as a customs duty. The mere fact that it may be convenient in the case of imported goods to collect the consumption tax at the Customs Office does not alter its essential character as a tax levied upon all goods, whether imported into, or produced in, Morocco.'[2]

The minority, on the other hand, considered that United States nationals in Morocco enjoyed 'a general immunity from Moroccan taxation, apart from the effect of any most-favoured-nation clause'.[3] Such a conclusion followed logically from its opinion that Moroccan legislation was not ultimately enforceable against United States nationals without the assent of the United States. The minority also held, however, consistently with its view of the effect of the Madrid Convention and the Act of Algeciras,[4] that a general immunity from taxation derived as well from these treaties 'by necessary implication'.[5] It is clear, therefore, that the positions adopted respectively by the Court and by the minority, with regard to the Decree of 28 February 1948, were much influenced by their approach to the general question of capitulatory rights.

Issue No. 1. *The Decree of 30 December 1948*

Although, as we have seen,[6] this Decree was the immediate origin of the dispute, it is convenient to consider it last of all among all the various issues which were submitted to the Court for decision. The Court, having in terms held that the jurisdiction of the United States consular courts in Morocco was confined to cases between United States nationals and to certain cases (specifically covered by the Act of Algeciras) in which United States nationals were defendants, the sole question therefore left for the consideration of the Court—as also for ours—was whether the Decree of 30 December 1948 contravened the treaty rights of the United States.[7] The French case with regard to the Decree of 30 December 1948 was as follows. It was argued that, in principle, import controls and exchange controls are matters within the domestic jurisdiction of a state and are not *per se* contrary to international law; that Morocco enjoyed, in principle, the same right as any other state to impose such controls; that, in order to show that Morocco did not enjoy this right, it would be necessary to point to treaty provisions expressly depriving her of it; that no such provisions existed; that the

[1] For the text of the Decree see *U.S.C.M.*, Annex 92.

[2] Judgment, pp. 206–7. In this connexion the Court referred to the decision in the *Free Zones* case, where it was held that 'the withdrawal of the customs line does not affect the right of the French Government to collect at the political frontier fiscal duties not possessing the character of customs duties' (*P.C.I.J.*, Series A/B, No. 46, p. 172).

[3] Judgment, p. 222. The voting on the general issue of tax immunity was six votes to five; on the specific issue raised by the Decree of 28 February 1948 it was seven votes to four (ibid., p. 213).

[4] See above, pp. 414–15.

[5] Judgment, p. 224.

[6] Above, p. 408.

[7] It was not disputed that the Decree did not contravene general international law.

treaties entered into by Morocco gave the United States no general right to claim that Moroccan laws might not be applied to United States nationals without the assent of the United States; that the Decree of 30 December 1948 did not violate any specific treaty right of the United States; that, in particular, it did not violate the Act of Algeciras; that the Act of Algeciras did not prohibit exchange controls and, if it referred to 'economic liberty without any inequality', it also asserted the principle of 'the sovereignty and independence of His Majesty the Sultan'; that, in any case, the reference in the Act to 'economic liberty without any inequality' was only in vague terms; that if Morocco, alone among modern states, could not enforce exchange controls, there would be no 'equality' for her; that, in the period after the end of the Second World War, exchange controls had become practically universal; that the use of exchange controls was justifiable by reference to considerations of *force majeure* and *ordre public*; that the Bretton Woods Agreements[1] and the Havana Charter[2] permitted the use of exchange controls in periods of economic stress; that, in case of conflict, the Bretton Woods Agreements, being later than the Act of Algeciras, must prevail; that it had been recognized in these Agreements and in the General Agreement on Tariffs and Trade[3] that exchange controls were not necessarily incompatible with general commercial equality; that, by extending aid under the Marshall Plan to Morocco, the United States must be regarded as having acknowledged that Morocco lacked dollars and required to take the same economic and financial measures as France herself; that, in general, exchange control without control also of imports, including *importations sans devises*, was ineffective; that it had been shown that 'l'abolition d'un régime d'importation sans devises est une mesure qui fait normalement partie du régime du contrôle des changes, et qu'il n'est pas nécessaire d'en établir autrement la légitimité';[4] and finally, that the Decree of 30 December 1948 was not discriminatory, because there was no discrimination, *as between United States nationals and others*, in the actual allocation of import licences and currency.[5] Every link in the chain of the French argument—and it is evident that it contains many weak links—was disputed vigorously and at length by the United States. The Court, however, unanimously—and, it is submitted, rightly—drew attention to the weakest link of all, when it said:

'The Government of France has submitted various contentions purporting to demonstrate the legality of exchange control. The Court does not consider it necessary to pronounce upon these contentions. Even assuming the legality of exchange control, the fact nevertheless remains that the measures applied by virtue of the Decree of December 30th, 1948, have involved a discrimination in favour of imports from France and other parts of the French Union. This discrimination cannot be justified by considerations relating to exchange control.'[6]

Thus, applying the textual principle of interpretation and resisting arguments that it should make allowances for the fact that the statesmen at Algeciras were not familiar with modern problems of currency shortage, the Court found unanimously that the Act of Algeciras prohibited discriminatory control of imports; that the Decree of 30 December 1948 involved just such a control; and that the Decree constituted a violation not only of the Act of Algeciras but also of the rights of the United States based on the

[1] I.e. the Articles of Agreement of the International Monetary Fund and the Articles of Agreement of the International Bank for Reconstruction and Development, drawn up at Bretton Woods, New Hampshire, U.S.A., on 22 July 1944 (Cmd. 6546).

[2] I.e. the Havana Charter for an International Trade Organization, signed at Havana, Cuba, on 24 March 1948, though not yet ratified (Cmd. 7375).

[3] This Agreement was signed at Geneva on 30 October 1947 (Cmd. 7258).

[4] *Pleadings*, vol. i, p. 86. [5] Ibid., p. 88. [6] Judgment, p. 186.

most-favoured-nation clause in the Treaty of 1836. In reaching this conclusion the Court confirmed that 'the rights of France in Morocco are defined by the Protectorate Treaty of 1912',[1] but observed that:

'In economic matters France is accorded no privileged position in Morocco. Such a privileged position would not be compatible with the principle of economic liberty without any inequality, on which the Act of Algeciras is based.'[2]

In thus finding that the Decree of 30 December 1948 contravened France's obligations under the Act of Algeciras, the Court confirmed that exchange controls and import controls, even though from the economic point of view they may be complementary measures, remain juridically distinct. It would have needed principles of treaty interpretation far looser than those habitually applied by the Court to blur a distinction which is explicit even in the most recent economic treaties.[3]

Conclusion

Even though there may be a disposition to prefer the minority's view on certain aspects of the case, it will be generally recognized that the Judgment of the Court is both valuable and fair. The moral effect of any judgment is weakened by a close vote and by a powerful dissent, but it should not be forgotten that the Court was unanimous in reaching three of its conclusions, namely, (i) that the Decree of 30 December 1948 was contrary to the treaty rights of the United States; (ii) that the consular jurisdiction referred to in Article 20 of the United States–Moroccan Treaty of 1836 covered criminal as well as civil cases; and (iii) that the United States was not entitled to claim that the application of all Moroccan laws to United States nationals required the assent of the United States, but that this right was limited to those laws which were contrary to the treaty rights of the United States or which required the co-operation of the United States consular courts for their enforcement. Also, the division of opinion on the issue of tax immunity was only an offshoot of the basic division of opinion concerning the issue of consular jurisdiction. It is, therefore, reasonable to conclude that the Court was less divided than might appear from a cursory analysis of the voting.

The International Court of Justice is always—and rightly—more concerned with settling according to law the dispute referred to it than with formulating legal principles of a general character. It could not, therefore, be held against the Court—even if it were true[4]—that, in this case, it had failed to make any significant contribution to the development of international law. The Court's main contribution on this occasion was, as Professor Hudson says,[5] that of paving the way towards a settlement of a long-standing dispute, and, in so doing, it has once again justified its existence as the judicial organ

[1] I.e. the Treaty of Fez of 30 March 1912. [2] Judgment, p. 185.

[3] Thus Article 24 (4) of the unratified Havana Charter for an International Trade Organization provides: 'Members shall not, by exchange action, frustrate the intent of the provisions of this Section [i.e. the removal of quantitative restrictions upon trade], nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund [i.e. "the elimination of foreign exchange restrictions which hamper the growth of world trade"].' Even from the economic point of view, a clear distinction can be drawn between the two types of control. As the United States Agent said: 'Import control may be related to exchange control, but it is not the same thing: exchange control is concerned with the exportation of currency and capital, and not with the importation of goods' (*Pleadings*, vol. ii, p. 237).

[4] As already stated, the question of the contribution made by the Court towards the development of international law in regard to most-favoured-nation clauses remains to be considered in the light of other decisions given in 1952–3.

[5] In *American Journal of International Law*, 47 (1953), p. 15.

of the United Nations. The Judgment records the significant fact—as do other recent Judgments of the Court—that, while the Court does not lack boldness on occasions where it considers boldness to be appropriate,[1] it does not consider it to be its task to revise treaties, merely because the circumstances have changed. Another feature of the case is that the Court has once more refused to be deterred by the possibly inconvenient or anomalous consequences of its own decision. Just as, in the *Haya de la Torre* case,[2] it declined to exceed the purely judicial function of declaring that the asylum must cease, and declined to advise how it should be brought to an end, so, in the present case, it did not allow itself to be deterred from giving what it believed to be the correct judicial decision on the question of consular jurisdiction by the consideration that the consequences might not be 'entirely satisfactory'.[3] While it is possible to exaggerate the distinction between legal disputes and political disputes, it is nevertheless an oversimplification of the position to hold that it is the business of the Court to settle definitively and in all respects the disputes that are submitted to it. The function of the Court is 'to decide in accordance with international law such disputes as are submitted to it',[4] and this function may often leave room for further political negotiation on the basis of the judicial finding of the Court. Some may cavil at what they may consider an undue restriction upon the role of the Court, but the scrupulous manner in which the Court carries out its functions is nevertheless a feature of its jurisprudence which generally commends itself and helps to augment the confidence which most Members of the United Nations have in the Court as the highest judicial organ of their Organization.

D. H. N. Johnson

LEGAL ASPECTS OF THE PEACE TREATY WITH JAPAN

A. *The legal background of the treaty*

The representatives of forty-eight nations at a conference convened in San Francisco by the United States Government concluded a Treaty of Peace with Japan on 8 September 1951. In almost every important respect the Treaty was a compromise. Its text was presented to the conference under the sponsorship of the Governments of the United Kingdom and the United States after negotiations extending over twelve months between the fourteen Allied nations primarily concerned in the Pacific War. The differences of opinion of those nations were acute. The South Pacific countries, which have greater reason to fear a revival of Japanese militarism than those more remote, felt that greater emphasis should have been placed on security, with precise limitations in the Treaty on Japan's armaments and forces, and restrictions on her key war-supporting industries. The United States and a majority of the other negotiating nations, on the other hand, did not favour long-term treaty controls which might impair the development of co-operative relations with Japan. The United States asserted that in its view such restrictions in the past had proved ineffective and would prove no less ineffective in the future. In consequence, it was eventually decided that Japan would contract to maintain peace and security, accept the obligations of the

[1] See Waldock, 'The Anglo-Norwegian Fisheries Case', in this *Year Book*, 28 (1951), p. 114, at p. 169.

[2] (Second) *Asylum Case* (*Colombia* v. *Peru*): *I.C.J. Reports*, 1951, p. 71.

[3] Judgment, p. 199.

[4] See Article 38 (1) of the Court's Statute.

Charter of the United Nations, refrain from force, and co-operate with the United Nations in any action taken by it under the Charter, while the Allied Powers would recognize Japan's inherent right of self-defence.[1] It is difficult to regard this attempt to ensure that Japan will conform to the pattern of international peace and security envisaged in the Charter as having much legal significance. The undertakings in question are indefinite and it is improbable that joint action to enforce them would be taken. The most that can be said is that a general international obligation has been imposed on Japan which might render unilateral action by that state in the future invalid.

The question of reparations caused Burma to refrain from attending the conference, while the agreement of Indonesia and the Philippines to the reparation clauses was secured only after considerable discussion. The United States emphasized that it had made good a $2,000,000,000 deficit in Japanese finances and was not disposed to pay reparations indirectly on behalf of Japan. It was eventually decided to make use of surplus Japanese manufacturing capacity to process raw materials from war-devastated countries. The reparations clauses therefore are much less extensive in operation and much less explicit in detail than is customary.

In view of the impossibility of securing unanimity on the question of the Government entitled to represent China, that nation was omitted altogether from the negotiations and the conference. The Soviet Union refrained from associating itself with the negotiations, asserting that legally these should have been carried on by the four major Powers, including the Central People's Government of China. The United States in Notes of 19 May and 7 July 1951 repudiated this proposition and emphasized that in the view of the majority of the Allied Powers no single state was entitled to a veto. At the conference the Soviet delegate objected to the terms of reference laid down in the invitation, which envisaged voting on a specific draft. He moved an amendment to the proposed rules of procedure to permit the submission of alternative Treaty provisions. This motion was rejected, and the Treaty was accepted and signed on the basis arrived at in the negotiations.

B. *The territorial dispositions*

The territorial provisions of the Treaty are, from a legal point of view, its least satisfactory aspect. Their framework was laid down in the Cairo Declaration of 1 December 1943, the secret Yalta Agreement of 11 February 1945, and the Potsdam Proclamation of 26 July 1945. The legal significance of each of these instruments is a matter of considerable controversy. The Cairo Declaration stated that it was the 'purpose' of Great Britain, the United States, and China to strip Japan of all the islands in the Pacific which she had seized or occupied since the beginning of the First World War, to restore to China 'all the territories that Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores', and to effect the independence of Korea.[2] In the Yalta Agreement 'the leaders of the three Great Powers' agreed that certain claims of the Soviet Union would be 'unquestionably fulfilled' after Japan's defeat. These claims were explicitly stated to be the restoration to Russia of South Sakhalin and the islands adjacent to it, the internationalization of the port of Darien, and the restoration of the lease of Port Arthur. It was further agreed that the Kurile Islands would be 'handed over' to the Soviet Union. The Cairo Declaration was accepted and confirmed in the Potsdam Proclamation, in which it was declared that 'Japanese

[1] Article 5 and Preamble.

[2] *American Journal of International Law*, 38 (1944), Docs., p. 8.

sovereignty shall be limited' to the principal islands of Japan and such minor islands as would be determined. The latter declaration was incorporated in the Decision of the Far Eastern Commission of 19 June 1947 setting forth the basic post-surrender policy for Japan. In the instrument of unconditional surrender of 1 September 1945 Japan accepted the provisions of the Potsdam Declaration and undertook to carry them out. The legal effect of this acceptance is by no means clear. It has been interpreted as a surrender of Japanese sovereignty over the areas specified in the Cairo Declaration,[1] and, with respect to Korea at least, subsequent decisions appear to have been based on that interpretation. In November 1947 the United States voted for the establishment of a national government of Korea, and despite Soviet objections this Government, which actually controlled only half the country, was recognized by forty states as the Government of the Republic of Korea. In view of this it would be profitless to deny that Korea was an independent state after 1947, but it by no means follows that this independence was in virtue of a surrender of Japanese sovereignty in 1945. In December of 1945, in fact, the Moscow Conference of Foreign Ministers agreed that the subsequent peace treaty with Japan would provide for the renunciation of Japan's rights in Korea, and that in the meantime a joint commission would work out proposals for the development of self-government under a four-Power Trusteeship Agreement with a view to independence in five years. This agreement seems to have envisaged Japanese sovereignty terminating with the Treaty of Peace, which at that stage was expected to be signed within five years, and not with the surrender in 1945. This view of the effect of the surrender instrument receives confirmation from the wording of the Potsdam Proclamation, which stated, immediately after the acceptance of the Cairo Declaration, that Japanese sovereignty would be limited to the principal islands and such others as might be determined. The very vagueness of this statement would seem to exclude any assumption that Japanese sovereignty was in 1945 surrendered in respect of all but the principal islands, and it would seem preferable to view the independence of Korea in 1947 as a matter of secession from Japanese sovereignty. In the Peace Treaty Japan merely recognizes this independence.[2]

The general conclusion would therefore be that, with the exception of Korea, Japanese sovereignty subsisted until the coming into force of the Treaty of Peace over all territories in respect of which Japan in the Treaty renounces her rights and titles. The appropriate method of giving effect to the change of sovereignty would have been the traditional one of cession by conveyance clause. Such a procedure was rendered impossible by the failure of the delegations at San Francisco to reach unanimity, and the United States delegate, Mr. J. Foster Dulles, in his statement on the Treaty acknowledged that the ultimate disposition of each of the ex-Japanese territories was not precisely specified. The status of a number of these territories is therefore controversial. It will be convenient to deal with them separately.

1. *The Ryukyu Islands, &c.*

The ineffectiveness of the instrument of surrender to divest Japanese sovereignty in 1945 would seem to be implied in the Treaty provision relating to Nansei Shoto, south of 29 degrees north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island, and the Volcano Islands), and Parece Vela and Marcus Island. Japan undertakes to concur in any proposal of the United States to place these islands under the trusteeship system with the United States as sole administrating authority. It is explicitly recognized that

[1] See Potter in *American Journal of International Law*, 44 (1950), p. 709. [2] Article 2 (*a*).

pending affirmative action in this direction the United States will continue to exercise all powers of administration, legislation, and jurisdiction over the islands.[1] Residual sovereignty is thus implied to remain vested in Japan, and confirmation of this is contained in statements of the delegates of the United States and the United Kingdom at the San Francisco Conference. The Prime Minister of Japan expressed the satisfaction of his country at this decision and hoped that the administration of the islands would in due course revert to Japan. The actual status of the islands would therefore seem to be somewhat parallel to that of Cyprus as constituted in the Final Act of the Congress of Berlin in 1878. It is a status the legal incidents of which are by no means certain, as that precedent illustrates. In an opinion of the Lord Chancellor delivered to the British Government on the question whether Turkish sovereignty over Cyprus was nominal only, the view was taken that Great Britain had become invested with such rights as Turkey had enjoyed, 'the Porte retaining the reversion'.[2] The British Foreign Secretary was also of the opinion that the transfer of the island to Great Britain had 'all the incidents of a cession'.[3] The United States' administration of the islands would, if this analogy is valid, appear to be different in juridical content from its previous administration as an occupying Power. To this new status the law of state succession would apply in its entirety.

2. *The Kurile Islands and South Sakhalin*

Japan renounced all title to 'the Kurile Islands, and to that portion of Sakhalin and the islands adjacent to it over which Japan acquired sovereignty as a consequence of the Treaty of Portsmouth of September 5, 1905'.[4] This provision was challenged by M. Andrei Gromyko, the Soviet delegate at San Francisco, on the ground that, while Japanese sovereignty was renounced, the ultimate disposition of the territories in question was left indeterminate. He referred to the 'inadmissibility of a situation under which the draft treaty with Japan fails to state that Japan should recognize the sovereignty of the Soviet Union over the southern part of Sakhalin and the Kurile Islands'.[5] Mr. J. Foster Dulles, in dealing with this objection, was careful to avoid committing the United States to the view that Japanese sovereignty had been replaced by that of the Soviet. 'The Treaty', he said, 'carries out the provisions of the Potsdam surrender terms, the only agreement by which Japan and the Allied Powers as a whole are bound. So long as other Governments have rights under the Yalta Agreement which the Soviet Union has not fulfilled, there is at least question as to whether the Soviet Union can, with "clean hands", demand fulfilment of the parts of that agreement it likes.'[6] In view of the fact that the Potsdam surrender terms make no reference to the ultimate transfer to the Soviet of the territories in question this observation does not clarify the issue. It is true that Japan recognizes the treaties concluded by the Allied Powers for terminating the war,[7] and the Soviet might argue that thereby Japan has become a party to the Yalta Agreement which envisaged the transfer of sovereignty to the Soviet. It may, however, be difficult to attribute to that Agreement any juridical significance. Professor Briggs[8] has pointedly asked on whom the Agreement is binding. It was not entered into by sovereign states but only by their 'leaders', and although it may be considered an executive agreement binding on the United States under certain conditions, doubts have been expressed whether it is binding upon

[1] Article 3. [2] F.O. 78/3373. [3] Ibid.
[4] Article 2 (*c*). [5] *New York Times*, 9 September 1951.
[6] *Department of State Bulletin*, vol. 25, No. 638 (17 September 1951), p. 462.
[7] Article 8. [8] In *American Journal of International Law*, 40 (1946), pp. 376 ff.

Great Britain.[1] It is, therefore, an unsatisfactory document of title for the Soviet. The Japanese Prime Minister, Mr. Shigeru Yoshidas, has stated that in Japan's view both the Kuriles and South Sakhalin were merely under Soviet protection from 20 September 1945. This occupation, he inferred, was no different in kind from the Russian military occupation still continuing in Habomai and Shikotin, which the Japanese claim to be part of metropolitan Japan.[2] The renunciation by Japan of her acquisitions under the Treaty of Portsmouth might cause South Sakhalin to re-vest *de jure* in Russia, but it can have no such effect with respect to the Kuriles which, despite the implications of the Peace Treaty, were Japanese long before 1905. If *de facto* Russian sovereignty over the islands is to be converted into *de jure* sovereignty, this can probably only be by some process of annexation.[3] In view of the Prime Minister's statement it is by no means certain that Japan would recognize any such process, and the situation is therefore full of possibilities.

3. *Formosa and the Pescadores*

The lack of unanimity at San Francisco precluded any final settlement of the complex question of Formosa, and it is therefore of interest to consider briefly what was the effect of this failure. Japan merely renounced all right to the island and to the Pescadores.[4] If the Cairo Declaration constituted a legal agreement to which Japan became a party in virtue of the instrument of surrender it might be possible to argue that the islands vested jointly in September 1945 in Great Britain, the United States, and China. There is, however, little evidence that the decisions arrived at in Cairo and to which Japan acceded have any legal characteristics. They were not even formulated as an agreement, and if the Yalta Agreement is not generically a treaty then *a fortiori* the Cairo Declaration is not. The only alternative, then, is to regard China as having been in military occupation of Japanese territory. After the dereliction of that territory by Japan it is probable that the Chinese occupation has crystallized into at least *de facto* sovereignty. The dispute as to the ultimate disposition of the islands would on this view be between the Governments of Nationalist China and the People's Republic.

4. *Special provisions relating to China and Korea*

There is matter of legal interest in the provision made in the Treaty for China and Korea, despite the fact that these two states are not signatories. Japan renounces all special rights and interests in China[5] and acknowledges that China will have the same right to seize and retain property as reparations as the Allied Powers.[6] Korea is expressed to be 'entitled to' the provisions of the Article acknowledging her independence,[7] and also to those establishing an interim régime of most-favoured-nation preference.[8] There is also a similar provision where Japan undertakes, subject to reciprocity, to renounce claims (including debts) against Germany and German nationals.[9] None of the three states intended to benefit by these clauses has any contractual association with Japan, and the legal significance of the provisions in question is therefore disputable. It is clear that the performance of the purely economic obligations will depend

[1] Pan in *American Journal of International Law*, 46 (1952), pp. 42, 48. [2] Ibid., p. 57.
[3] The acquisition of Italian sovereignty over Tripoli in 1912 is a case in point. Turkey renounced sovereignty over the area and Italy notified its annexation to the Powers.
[4] Article 2 (*b*).
[5] Articles 10 and 21. [6] Articles 2, 10, 14 (*a*) and 21.
[7] Articles 2 (*a*), 21. [8] Articles 4, 9, 12. [9] Article 19 (*c*).

upon action by the Allied signatories. The situation in the case of the territorial provisions, however, is more complex. International law recognizes that territorial settlements arrived at in conference by a large number of states and recorded in a multilateral instrument enjoy an international character and, as Sir Arnold McNair has expressed it, have 'an objective existence'.[1] The provisions of the Treaty of Paris of 1856 respecting the demilitarization of the Åaland Islands were regarded by the Committee of Jurists set up by the Council of the League in 1920 to pronounce upon the question as capable of enforcement by any 'interested state'.[2] It may be that Japan's renunciation of rights in China and recognition of Korea's independence confer at least an 'interest' in those states which could be internationally asserted by them.

5. *Other territories*

Japan renounced all her rights under the mandate system and accepted the action of the Security Council of 2 April 1947 placing under the trusteeship system such islands as had formerly been subject to Japanese mandate.[3] The implications of this in any discussion on the nature of sovereignty must necessarily be beyond the scope of this Note. Japan also renounced any rights in Antarctica,[4] satisfying thereby the fears expressed by Australia and New Zealand at the British Commonwealth Conference at Canberra in 1947 that any 'vague title or rights' of Japan in that region might be reasserted.[5] Finally, Japan renounced her rights over the Spratly and Paracel Islands.[6]

C. *State succession*

The inconclusiveness of the territorial settlement precluded any legislation in the Treaty to anticipate the problems of state succession. To this extent the Treaty has broken a tradition established in most treaties relating to changes of sovereignty entered into in recent times. The importance of this omission in the case of the various islands detached must necessarily be small, but the failure to make some provision with respect to the repartition of the public debt, the recognition of foreign investments, and the performance of contractual obligations in Korea, Formosa and Sakhalin may have economic implications in the future. Such questions will fall to be determined by the general principles of state succession, which may be conveniently summarized as follows:

(1) Political, economic, commercial, and administrative treaties of Japan will cease to bind the detached territories.
(2) Dispositive treaties will subsist in so far as they affect the detached territories.
(3) The public debt of Japan will remain Japan's obligation unless secured on the detached territories or localized there.
(4) Rights of foreign nationals in the detached territories will subsist. Such rights include landed interests, economic concessions, localized debts, equities arising from localized contracts, and rights accruing under legal process. Such rights may be abrogated, but only subject to payment of compensation.
(5) The question of change of nationality is contingent on the ultimate disposition of the territories in question. In the meantime the states exercising *de facto*

[1] *International Status of South West Africa*, Advisory Opinion, *I.C.J. Reports*, 1950, pp. 153–4.
[2] *League of Nations Official Journal*, October 1920, Special Supplement No. 3, p. 17. See de Visscher in *Revue de droit international et de législation comparée*, 3rd ser., 2 (1921), pp. 251 ff.
[3] Article 2 (*d*).
[4] Article 2 (*e*).
[5] *N.Z. White Paper*, No. 38.
[6] Article 2 (*f*).

jurisdiction are competent to claim the inhabitants as their nationals. Whether the states ultimately acquiring sovereignty accept these inhabitants as nationals is a matter of discretion.

The disposition of the property of Japan and her nationals in all the areas save the Ryukyus and Bonins is to be regulated by agreement with the 'authorities administering such areas'. Such property includes claims and debts against those authorities and the residents (including juridical persons) of the areas in question. The disposition in Japan of property of such authorities and residents is subject to similar agreement.[1] In the absence of any agreement the general principles of state succession prevail. Japanese-owned cables connecting Japan with territory 'removed from Japanese control' are to be equally divided between Japan and the authority administering the detached territory.[2] It is not clear if this is a final alienation of half the cables to that administering authority, but it seems that they will pass under the general law of state succession relating to public assets to the state ultimately acquiring *de jure* sovereignty.

D. *Public law provisions*

1. *Treaties*

The extent to which war automatically cancels bilateral treaties subsisting between the belligerents has not been determined with certainty. Generally speaking, it may be assumed that only political treaties which do not contemplate suspension during a state of war fail to revive on the conclusion of peace,[3] but there is in addition a body of opinion in favour of the view that commercial treaties either lapse[4] or may be annulled by declaration at the discretion of either party.[5] Whatever may be the strict legal position, the Peace Treaty with Japan has conformed to the general pattern laid down in the settlements of 1919[6] and 1923, and adopted in the Peace Treaties with Italy,[7] Roumania,[8] Bulgaria,[9] Hungary,[10] and Finland[11] in 1947. The general principle[12] has been to regard all bilateral treaties as abrogated save such of them as each of the Allied Powers notifies the defeated signatory it wishes to continue in force or revive. In the case of the Japanese settlement the treaties so notified are to be considered as having been continued in force or revived three months after the date of notification. The period during which notification may be given has been extended from the usual six months to one year.[13]

It is generally agreed that multilateral conventions remain unaffected by war except in so far as the belligerents may suspend their execution in relation to themselves if the necessities of war compel them so to do.[14] It has therefore been found necessary in

[1] Article 4 (*a*).

[2] Article 4 (*c*).

[3] *North Atlantic Fisheries Arbitration* (1910), Scott, *Hague Court Reports*, pp. 104, 115; Fiore, *International Law Codified*, translated by Borchard (1918), § 845; Oppenheim, *International Law*, vol. ii (5th ed. by Lauterpacht, 1935), pp. 253 ff.; Moore, *Digest of International Law* (1906), vol. v, p. 383.

[4] Hall, *International Law* (8th ed. by P. Higgins, 1926), p. 404; Hyde, *International Law*, vol. ii (2nd ed., 1945), § 550; Fauchille, *Traité de droit international public*, vol. ii (1922), p. 55; Wheaton, *International Law* (5th ed.), p. 377. Compare Fiore, *supra*.

[5] Coleman Phillipson, *Termination of War and Treaties of Peace* (1916), p. 264; Oppenheim, op. cit., p. 254; *The Sophie Rickmers*, 45 F. (2d) 413 at pp. 418–21.

[6] E.g. Versailles, Article 289; St. Germain, Article 241; Trianon, Article 224. The Italian Court of Cassation regarded such provisions as merely confirmatory of law: *Società Walter Kidde v. Società Deutsche Werft*, *Annual Digest of Public International Law Cases*, 1929-30, Case No. 281.

[7] Article 44.

[8] Article 10.

[9] Article 8.

[10] Article 10.

[11] Article 12.

[12] See McNair, *The Law of Treaties* (1938), pp. 548–51.

[13] Article 7 (*a*).

[14] See Hackworth, *Digest of International Law*, vol. v (1943), p. 387.

modern peace treaties to incorporate a clause providing for the renunciation by the defeated signatory of all rights accruing to it from multilateral treaties which the victorious signatories desire should no longer be enjoyed by it. In this respect the practice in the 1947 Treaties and the Japanese Treaty[1] has been uniform. At the Paris Conference in 1947 the Netherlands delegate, Professor François, suggested that provision be made in the draft treaties for the continuance in operation of multilateral treaties. The Soviet delegate replied that such a provision would be unnecessary as multilateral treaties had at the most merely been in abeyance, and some, such as the Red Cross Convention, had not even been suspended. This view was accepted by the members of the Legal and Drafting Commission as a correct statement of the position.[2] Japan has undertaken in particular to renounce within six months of the coming into force of the Treaty all her rights derived from the Convention of 20 January 1930 respecting the Bank for International Settlements and the Statutes of the Bank.[3]

2. *Allied forces in Japan*

The Peace Treaty envisaged the withdrawal from Japan of all occupying forces within ninety days of the coming into force of the Treaty.[4] It follows that such forces of the Allied Powers as have remained in Japan after that date have no more legal right than any visiting armed forces enjoy in foreign territory. The position of such forces is a matter of controversy.[5] The United States Government secured the right under the Security Treaty with Japan of 8 September 1951 'to dispose the United States land, air and sea forces in and about Japan'. An administrative agreement within the framework of this treaty settled the question of jurisdiction over United States forces. Other nations whose troops engaged in Korea have administrative bases in Japan did not arrive at a similar arrangement, and difficulties have in consequence arisen which are still at the date of the writing of this Note largely unresolved. New Zealand soldiers and British naval personnel have been arrested on Japanese territory by Japanese authorities. In both cases their release was secured, but the Japanese Government has been careful to reserve its rights of jurisdiction.[6] Administrative agreements are being negotiated.

E. *Private law provisions*

The settlements of 1919 and 1947 were largely concerned with the question of restitution, and the provisions in those treaties relating to the recognition of acquired rights were thus intimately bound up with the reparations provisions. Generally speaking, three classes of reparations were provided for—collective payments and transfers of assets, the retention by the victorious Powers of assets seized and retained, and specific compensation. The question of reparations figures much less prominently in the Treaty with Japan. The latter recognizes her liability to pay reparations while the Allies recognize her practical inability to do so in full.[7] The only traditional form of reparations provided for in the Treaty is the seizure and disposal, with certain excep-

[1] Although more extensive in the latter: see Article 8.
[2] Annex to C.P. (J.R.), 6th Meeting. [3] Article 8 (*c*). [4] Article 6.
[5] See Barton in this *Year Book*, 27 (1950), pp. 186 ff.
[6] On 5 August 1952 two British sailors were convicted by a Japanese court at Kobe. On the same day Mr. Eden made it clear to the Japanese Ambassador that the British Government did not recognize the jurisdiction of the Japanese Court. On 28 August the Japanese Government replied to the British representations asserting that pending the execution of some agreement the Japanese courts were to be regarded as having jurisdiction. See the opinion of Professor Yokato of Tokyo University referred to in an editorial in *The Times*, 10 October 1952, p. 7, col. 3.
[7] Article 14 (*a*).

tions, of property of Japan and Japanese nationals within the jurisdiction of Allied signatories.[1] Property of Japan in neutral countries is to be transferred to the International Committee of the Red Cross to be liquidated and funded for the benefit of former Allied prisoners of war and their families.[2] In addition, Japan is obliged by a very indeterminate clause to provide services in production and salvage to Allied Powers whose territories were occupied and damaged.[3] In other respects Japanese interests are recognized, and in particular Japanese literary and artistic rights are to be treated 'on a basis as favourable to Japan' as circumstances permit.[4]

While the Treaty thus departs from recent tradition in its general compensatory provisions it adheres very closely to acknowledged practice in the matter of the recognition of acquired rights of a private law or mixed public and private law character. Private rights have long been recognized as inviolable in time of war,[5] and it has thus become usual to require a defeated state to return to the title holders all assets owned by the victorious nations or their nationals on the territory of that state, or at least to provide adequate compensation.[6] It is a matter for regret that the like obligations of victorious Powers are not similarly recorded. Japan undertakes to accord to Allied nationals the same treatment with respect to industrial property rights impaired during the war as already provided for in Japanese municipal law by legislation of 1949 and 1950.[7] Following the practice established in the previous settlements, an article was inserted in the Japanese Treaty in which the signatories 'recognized that the intervention of the state of war has not affected the obligation to pay pecuniary debts arising out of obligations and contracts which existed and rights which were acquired before the existence of a state of war'. The obligations in question include those of the Japanese Government and its nationals and the Allied Government and their nationals.[8] Japan specifically 'affirmed' her general liability under international law for the pre-war external debt.[9] There is no provision for the payment of interest accruing during wartime. The question whether interest must be paid on a debt which could not be liquidated before the coming into force of a treaty of peace has never been satisfactorily settled,[10] and should be regulated by agreement.[11] The failure of both the 1947 and Japanese settlements to imitate that of 1919 in this respect is to be regretted. The Japanese Treaty goes further than the preceding ones, however, in acknowledging as acquired rights in this respect claims for unliquidated damages which might be brought by Allied Powers on behalf of their nationals.[12] Such claims are not in themselves debts, but the right to have them determined by appropriate process is regarded by inter-

[1] Article 14 (*a*) (2). [2] Article 16. [3] Article 14 (*a*) (1).

[4] Article 14 (*a*) (2) (v).

[5] See Fischer Williams, *Chapters on Current International Law and the League of Nations* (1929), pp. 188–208; McNair, *Legal Effects of War* (3rd ed., 1948), pp. 101 ff., 119 ff.; Martin in this *Year Book*, 24 (1947), p. 275.

[6] In Article 15 (*a*) Japan undertakes to return tangible and intangible property of Allied nationals. Normally Japan would be competent to expropriate such assets subject to payment of compensation. This Article limits such right. Compensation is only an alternative when the property has been injured. [7] Article 15 (*b*).

[8] Article 18 (*a*). Debts subsist as a matter of law under the general principle of the inviolability of acquired rights. In English law see *Seligman* v. *Eagle Insurance Co.*, [1917] 1 Ch. 519; *Continental Tyre and Rubber Co.* v. *Daimler Co.*, [1915] 1 K.B. 893; [1916] 2 A.C. 307. The plaintiff was the drawer and holder of bills accepted by the defendants. They were presented after the declaration of war. See Article 81 of the Peace Treaty with Italy and corresponding Articles in the other 1947 Treaties.

[9] Article 18 (*b*). [10] Hyde, op. cit., p. 614.

[11] McNair, *Legal Effects of War* (3rd ed., 1948), pp. 105–7. Clause 22 of the Annex to Article 296 of Versailles provided for interest on debts to accrue. [12] Article 18 (*a*).

national law as an acquired right. There is also a customary provision for the protection of literary and artistic property rights of the Allied Powers and their nationals existing in Japan prior to the outbreak of war.[1]

The Japanese settlement does not conform to recent practice, however, in its mode of legislation with respect to the subsistence of contracts. The Treaties of 1947 dealt with this matter in an Annex which legally was a substantive part of the Treaty. In the Japanese settlement the question of contracts is reserved for a Protocol which requires to be specially ratified before its provisions become operative in municipal law. In most other respects the drafting is similar.

Acquired rights arising out of private law contractual relationships are in general no more affected by war than other property interests, but the extent to which the contracts themselves are regarded by international law as *ipso facto* annulled is indeterminate.[2] The practice adopted in English municipal law is to regard as abrogated all contracts requiring for their further performance in whole or in part intercourse of any sort between enemies.[3] Into this category probably fall all contracts save those 'which are really the concomitants of rights of property'.[4] The test of intercourse is largely common to both international law and most systems of municipal law, but it is capable of wide variation in the mode of its application. The Treaties of 1947[5] differed from those of 1919 in maintaining in force 'such parts of any contract as were severable and did not require for their execution intercourse' between the parties. Only contracts which were not 'severable' and therefore required intercourse for any part performance were deemed to be dissolved. A wider range of contracts was thus probably maintained in operation than English law would have admitted.[6]

The same test of intercourse and its subsidiary test of severability are adopted in the Protocol to the Japanese Treaty,[7] and the uniformity and regularity of this practice might well be regarded as the international rule now governing the question. All contracts are deemed to have been dissolved in their entirety save those not requiring intercourse between enemies. Such parts of a contract as are severable and did not require intercourse are maintained in force, the residual parts being deemed to have been dissolved. It is interesting to note also that an attempt has been made by international legislation to deal with the equitable problems occasioned in municipal law through frustration of contracts on the outbreak of war. A general provision has been inserted to the effect that dissolution of a contract does not relieve any party from the obligation to repay amounts received as advances and in respect of which such party has not rendered performance in return.[8] Further performance in the form of payment of a liquidated sum is not deemed to be 'intercourse' but is satisfaction of a 'debt'.[9]

An enemy for the purposes of the Protocol is defined as a natural or juridical person whose trading operations have become unlawful under the municipal laws to which that person was subject and also under the *lex loci contractus*.[10] So far as English law is

[1] Article 15 (*c*) (i). [2] See Martin, loc. cit., pp. 295 ff.; McNair, op. cit., pp. 82 ff.

[3] Intercourse does not necessarily mean only commercial intercourse. See Lord Dunedin in *Ertel Bieber & Co.* v. *Rio Tinto Co.*, [1918] A.C. 260 at p. 274. See also *In re Badische Co.*, [1921] 2 Ch. 331; *Binon* v. *German State and the Silesian Fire Insurance Co.*, *Annual Digest of Public International Law Cases*, 1919–22, Case No. 274.

[4] Lord Dunedin in the *Ertel Bieber Case* (*supra*), at p. 269. See also McNair, *ubi supra*, p. 90; Baty in *The Law Quarterly Review*, 31 (1915), p. 49. Contracts of affreightment are only one of the classes of contracts abrogated by war.

[5] See Annex 16 to the Peace Treaty with Italy.

[6] See Martin, loc. cit., p. 295. [7] Protocol, A. 1 and 2. [8] A. 1.

[9] Article 18 of the Treaty mentions debts arising out of contracts. See the general comment of McNair, *Legal Effects of War*, p. 93. [10] Protocol, F.

concerned this would imply an enemy in the territorial sense and not an enemy national subject to the Crown's protection.[1] The contracts subject to the Protocol may therefore be summarized as contracts between enemies within the meaning of the Trading with the Enemy Act, 1939, as amended by Defence Regulations, that is, contracts of any person or body constituted in or under the laws of a state at war with the Crown, carrying on business in enemy territory, or controlled by a person or body so constituted or carrying on business.

It is a necessary corollary of the doctrine of the inviolability of acquired rights that periods of prescription or limitation affecting nationals of belligerent countries who were unable to take judicial action during war-time, or to comply with the formalities necessary to safeguard their rights, should be suspended for the duration of the war.[2] A clause to this effect was inserted in the 1919[3] and 1947[4] treaties and has been substantially repeated in the Japanese Protocol. It is generally agreed that periods of limitation running against an enemy defendant should be suspended whether the periods began before the outbreak of war or not, but there is no agreement on the question whether they are necessarily suspended when running in his favour.[5] The Report of the Committee on Limitation of Actions and Bills of Exchange[6] suggests that time should run in favour of an enemy defendant, and the provisions of the Protocol under discussion seem favourable to this view. Suspension is specifically envisaged only when judicial action was rendered impossible,[7] and hence a British subject who failed to take action against an enemy defendant during war-time would probably be unable to claim the benefit of the Protocol. Where suspension does operate the periods are to run again from the date of the coming into force of the Treaty. Special mention is made of interest and dividend coupons. The general principle is further amplified by a provision that the Japanese Government will restore rights detrimentally affected by legal process taken during the war, or at least provide just and equitable relief.[8]

The Protocol repeats the Treaties of 1947 in providing that no negotiable instrument is to be invalid by reason only of failure to present, give notice, protest the instrument, or complete any formality during the war.[9] Three months is allowed for the necessary steps. More elaborate provision than is customary is made with respect to contracts of insurance and reinsurance.[10] Insurance contracts other than life insurance have been regarded by the English common law as abrogated automatically on the outbreak of war, whether or not a premium had been paid, unless a claim had already arisen.[11] It is true that any particular insurance contract may not involve intercourse and there may be no event occurring during war which would occasion communication with the underwriters. Such considerations are regarded as irrelevant and all insurance contracts

[1] *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284; *Nordman* v. *Rayner* (1916), 33 T.L.R. 87.

[2] McNair, *ubi supra*, pp. 74 ff. See *Siplyak* v. *Davis*, *Annual Digest of Public International Law Cases*, 1923–4, Case No. 224 and the editorial note.

[3] See, e.g., Article 300 (*a*) of the Treaty of Versailles; *Administrator of Hungarian Property* v. *Finegold* (1931), 47 T.L.R. 288; *Mathias* v. *Mousa Seidah*, *Annual Digest of Public International Law Cases*, 1935–7, Case No. 230; *Administrator of Austrian Property* v. *Russian Bank for Foreign Trade* (1931), 47 T.L.R. 550.

[4] See Annex XVI to the Treaty with Italy and corresponding Annexes to the other Treaties and Treaty of Peace Act, 1947.

[5] McNair, *ubi supra*, p. 80.

[6] Cmd. 6591. The Limitation (Enemies and War Prisoners) Act, 1945, however, suspends the statutes of limitation both in favour of and against an enemy party.

[7] Protocol, B. 1. [8] B. 2. [9] C. 1. [10] D.

[11] *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 484; *Excess Insurance Co.* v. *Mathews* (1925), 31 Com. Cas. 43, where it was assumed that a pre-war policy issued by a British Company to a Hungarian would have been abrogated but for the provisions of the Treaty of Peace. See Bunyon, *Fire Insurance* (1923), pp. 422–6; McNair, *Legal Effects of War*, pp. 242, 257.

are treated as a class. The Japanese Protocol will have the effect of preserving many more contracts of insurance than English law would normally admit. If the risk attached before the parties became enemies and premiums due had been paid, all contracts of insurance other than life insurance are kept in force.[1] Others are deemed not to have come into existence and moneys paid are returnable. Contracts of reinsurance are deemed to have been determined, and all cessions made thereunder are cancelled with the exception of those in respect of voyage policies, which remain in effect until their natural expiry.[2] Contracts of facultative reinsurance, with the exception of voyage policies, where the risk attached and premiums due had been paid remain in full effect until the date the parties became enemies and are deemed to have been determined on that date.[3] Life insurance policies are expressly excepted from the provisions of the Protocol and it is to be anticipated that these remain unaffected by war. A life insurance contract differs substantially from other insurance contracts in its proprietary character.[4] It is normally intended to subsist for many years and during its currency is terminated, as a rule, only on failure to pay an annual premium. The policy has a surrender value which increases each year. This view of the effect of war on life insurance contracts is substantiated by a clause in the Japanese Protocol providing for the recognition of any transfer from the original to another insurer at the instance of Japanese administrative or legislative authorities.[5]

These rules respecting negotiable instruments and insurance contracts are merely detailed applications of the test of severability. To that extent they illustrate that the test is to be focused against the general principle of recognition of equities and to be given as liberal an interpretation in international law as those equities demand. Like consideration for private rights underlies the provisions, contained in both the 1947 and Japanese settlements, for review of judicial proceedings affecting Allied nationals and the review of prize court decisions.[6] Little is available on the jurisprudence of Japanese prize courts during the war, but executive interference is suspected. Japan also accepts the judgments of the International Military Tribunal and other war crimes courts and undertakes to carry out the sentences imposed thereby. The power to grant clemency is to be exercised only on the decision of the Governments represented on the tribunals.[7] This is virtually the only matter in respect of which Japanese domestic sovereignty is limited by the Treaty.

F. *General provisions*

The economic clauses of the Treaty have only small interest from the point of view of law. Japan is to enter into agreements with the Allied Powers to regulate matters of commerce,[8] fishing,[9] and international air transport.[10] Pending the conclusion of agreements respecting these matters Japan is to extend most-favoured-nation treatment on a basis of reciprocity.[11] In the Preamble Japan undertakes to observe internationally accepted fair trade practices, and in a Declaration attached to the Treaty has indicated her intention of seeking admission to a number of the more important international instruments governing trade, narcotics, and war victims.

There is in addition specific recognition by Japan of the validity of acts of former military occupants of Japanese territory. It is well established as a matter of law that administrative acts of such an occupant within the framework of its own municipal law are legitimate and are not rendered invalid by the conclusion of a treaty of peace. The

[1] Protocol, D. 1. [2] D. 3. [3] D. 4.
[4] See McNair, *ubi supra*, pp. 259 ff. [5] E.
[6] Article 17. [7] Article 11. [8] Article 12.
[9] Article 9. [10] Article 13. [11] Article 12 (*b*).

Japanese Treaty has gone farther than the law in securing acknowledgement 'of all acts and omissions done during the period of occupation under or in consequence of directives of the occupation authorities and [that Japan] will take no action subjecting Allied nationals to civil or criminal liability arising out of such acts or omissions'.[1] This would probably serve in municipal law to legitimate any sequestrations of property or alteration of land titles, matters not sanctioned by international law.[2]

D. P. O'Connell

TERMINATION OF WAR BY UNILATERAL DECLARATION

I

A UNILATERAL declaration is not the traditional instrument for terminating wars between states. When certain states, and among them the United States of America, had recourse to it after the First World War, this was practically without precedent, apart from cases of civil war. But in 1951 most of the Allied Powers who had been belligerents in the Second World War declared unilaterally that their state of war with Germany was terminated. The object of this Note is to elucidate certain particularities of a unilateral declaration terminating a war; to examine to what extent such a declaration is equivalent to or a substitute for other modes of concluding peace; and to determine whether it may properly be regarded as a new method of terminating wars. It may be noted that the term 'declaration', in this connexion, must not be understood in a strictly technical sense. In France, for example, the declaration took the form of a Government *Décret*; in the United Kingdom that of a Notice in the Official Gazette; and in the United States the form of a Presidential Proclamation.

It is convenient, for the purposes of this Note, to consider the situation which resulted from the cessation of hostilities in the two world wars. Why did the United States not conclude a Peace Treaty after the First World War as did her Associates (with the exceptions of China[3] and Costa Rica,[4] who also terminated their state of war with Germany by declaration and not by a Peace Treaty), and why was there no Peace Treaty with Germany for a prolonged period after the termination of hostilities in the Second World War?

The political and legal relationship of the United States to Germany between November 1918 and November 1921 was marked by four stages in the transition from war to peace:

(1) The cessation of hostilities was provided for in the Armistice Convention of 11 November 1918, which was then repeatedly prolonged.[5]

(2) A Peace Treaty was negotiated and signed on 28 June 1919.[6]

(3) On 19 November 1919 the Senate refused ratification on political and constitutional grounds which are not relevant here.

Before the fourth and last stage was reached, the state of war so far as the United

[1] Article 19 (*d*). See Oppenheim, op. cit., p. 487.

[2] See McNair, *Legal Effects of War*, p. 339; but compare *Bank of Ethiopia* v. *National Bank of Egypt and Liguori*, [1937] Ch. 513.

[3] Cf. Preamble to Agreement Regarding the Restoration of the State of Peace between China and Germany, *League of Nations Treaty Series*, 9 (1929), p. 272.

[4] Guggenheim, *Lehrbuch des Völkerrechts*, vol. ii, p. 820, n. 157.

[5] *Treaties, Conventions . . . etc., Between the United States of America and Other Powers, 1910–1923*, vol. iii, pp. 3307 ff., 3315 ff., 3323 ff., 3326 ff.

[6] Ibid., pp. 3331 ff.

States of America was concerned underwent several modifications. A general licence was issued by the Department of State on 14 July 1919 authorizing all persons in the United States to trade and communicate with persons resident in Germany. Much, though not all, war legislation was suspended by a Joint Resolution approved on 3 March 1921. A Commissioner to Germany was appointed on 15 January 1920. That step led one Senator to submit in the debates on the ratification of the Peace Treaty that the war had come to an end by the 'silent cessation' of hostilities, which had 'concluded the war in fact'.[1] The deadlock, which had arisen from the Senate's refusal to ratify the Peace Treaty and the Covenant, continued while the President refused to negotiate a separate Treaty with Germany which would exclude America's entry into the League of Nations. On 15 May 1920 Congress, seeking another way out, passed a joint resolution providing for a repeal of the Declaration of War and declaring the state of war at an end. This resolution was vetoed by the President on 17 May 1920, and did not come into effect.

The situation remained in suspense until, on 12 April 1921, the new President sent a message to Congress in which he stated:

'. . . It would be idle to declare for separate treaties of peace with the Central Powers on the assumption that these alone would be adequate, because the situation is so involved that our peace engagements cannot ignore the Old World relationship and the settlements already effected. . . .'[2]

The last words, 'settlements already effected', were an allusion to the Peace Treaty ratified by Germany and most of the Allied Powers, and to the question of reparations.

In the same message—and this brings us to the fourth stage—the President declared his readiness to approve a declaratory resolution by Congress to establish the 'state of technical peace without further delay'—with the qualifications necessary to protect American rights. On 2 July 1921 the President approved a 'Joint Resolution terminating the state of war between the Imperial German Government and the United States of America and between the Imperial and Royal Austro-Hungarian Government and the United States of America'.[3] The Resolution explicitly reserved to the United States and its nationals certain 'rights, privileges, indemnities, reparations or advantages'. This reservation is symptomatic of the defects inherent in a unilateral declaration terminating a state of war. As a unilateral act it cannot, unlike a Peace Treaty, contain a settlement of most of the matters outstanding between the former belligerents.

As an epilogue to this Resolution, the American Commissioner at Berlin was instructed on 5 July 1921 to inquire whether the German Government intended to 'question in any way any of the rights, interests, and advantages stipulated for the benefit of the United States of America in the Treaty of Versailles' (unratified though it was by the United States).[4] The German Government's answer being satisfactory, a Treaty between the United States and Germany 'restoring Friendly Relations' was signed at Berlin on 25 August 1921. The Treaty was not a Peace Treaty, but in its Preamble it included sections of the American Joint Resolution of 2 July. The Treaty was ratified by the President of the United States on 21 October 1921 and by the German Government on 2 November 1921. The President's ratification was subject to 'understandings' providing once more for the rights and advantages of the United States and its nationals. Ratifications were exchanged on 11 November 1921 (three years after the Armistice), and the Treaty entered into effect. In a Proclamation pro-

[1] 59 *Cong. Rec.*, p. 6565.
[2] *The Treaty of Versailles and After*, p. 17.
[3] 42 Stat. 105.
[4] *Foreign Relations of the United States* (Dept. of State Publication No. 894), vol. ii, p. 6.

mulgating the Treaty as in force, the President of the United States declared on 14 November 1921 'that the war between the United States and Germany terminated on July 2, 1921'.[1]

II

The unconditional surrender of the German armed forces in 1945 was the prelude to legal developments radically different from those of 1918. International relations entered a unique phase, partly because by the United Nations Declaration of 1 January 1942 the Allied Powers had pledged themselves 'not to make a separate armistice or peace with the enemies', but above all because after the collapse of German governmental authority Great Britain, the United States of America, Soviet Russia, and France, by their joint Declaration of 5 June 1945—the Berlin Declaration—assumed 'supreme authority' with respect to Germany without annexing her territory.

Various interpretations have been found for the Berlin Declaration, all of which have a direct bearing on the question of Germany's continued existence as a state after her unconditional surrender, and on the problem whether the state of war subsequently continued to exist between the Allies and Germany. Leaving aside the question whether the Berlin Declaration did in fact amount to an unconditional surrender of Germany (as distinct from the German forces), we may distinguish three different constructions of the Berlin Declaration.

(1) On the one hand, there is the thesis of Professor Kelsen, who maintained that Germany's unconditional surrender was tantamount to subjugation.[2] Since her unconditional surrender Germany had, according to this interpretation, ceased to exist as a state in the sense of international law, and the state of war had thus been terminated *ipso facto*. The Berlin Declaration meant that the occupying Powers placed Germany under their territorial sovereignty[3] and could not conclude a Peace Treaty with a national German Government since no such Government existed. Nevertheless, a formal declaration of peace by a unilateral declaration of the Occupying Powers was possible and even necessary.[4]

(2) Another interpretation of the Berlin Declaration was that it did *not* entail the subjugation of Germany. Even after her unconditional surrender, Germany had not ceased to exist as a state. Moreover, since no treaty of peace or declaration of the Allied Powers had been made terminating the state of war with Germany, the Allies were still in a state of war with Germany, although, as provided in the declaration of surrender, all active hostilities had ceased. This was the declared attitude of the British Government.[5]

(3) A third view of the Berlin Declaration was that it put an end to the war with

[1] 42 Stat. 1944.

[2] In *American Journal of International Law*, 39 (1945), pp. 518 ff.

[3] Kelsen suggested that the continued existence of Germany as a state would entitle the Occupying Powers only to maintain a belligerent occupation in accordance with the Hague Regulations (*American Journal of International Law*, 38 (1944), pp. 689 ff.). But see Guggenheim's theory of an occupation *sui generis* (*Lehrbuch des Völkerrechts*, vol. ii, pp. 930 ff.), which permits such interventions as reach far beyond the measures permissible under the Hague Regulations.

[4] A similar opinion was formulated by Kunz in *American Journal of International Law*, 46 (1952), pp. 114 ff. See also the article, 'La Cessation de l'état de guerre', in *Le Monde* newspaper, 23 June 1951.

[5] See statement of Mr. Hector McNeil in the House of Commons that 'Germany has not ceased to exist as a State, though the exercise of supreme authority in Germany has been assumed by the Allied Powers': 415 *House of Commons Deb.*, 5 s., col. 893. See also the Certificate from the Foreign Secretary produced in *Rex* v. *Bottrill, ex parte Kuechenmeister*, quoted in *American Journal of International Law*, 40 (1946), p. 812.

Germany, at least in the sphere of international law, although it did not imply Germany's subjugation or her extinction as a state. This, it would seem, was the attitude of the French Government. A *Rapport* of the French Foreign Minister, published together with a Government *Décret* of 9 July 1951 in the *Journal Officiel*,[1] reads as follows:

'. . . Il a été . . . reconnu que compte tenu de la déclaration de Berlin du 5 Juin 1945 concernant la prise de l'autorité suprême à l'égard de l'Allemagne par les trois puissances alliées, acte par lequel on doit considérer que l'état de guerre entre les puissances alliées et l'Allemagne a pris fin sur le plan des rapports entre Etats, il est maintenant possible de régler définitivement le problème de l'état de guerre, qui ne subsistait dès lors que sur le plan de droit interne, en éliminant de la législation interne de chaque puissance alliée les conséquences de l'état de guerre.'

Thus, from the day of the Berlin Declaration, France considered herself no longer at war with Germany save for matters of municipal law. On the other hand, Great Britain, the other countries of the Commonwealth, as well as the United States of America, considered that the state of war with Germany continued both in international and in municipal law. If France and the other Western Allies were to issue Declarations terminating the state of war with Germany, then obviously the French Declaration was bound to be more restricted in scope than those of the Anglo-Saxon Powers. These Declarations can best be considered in the light of the events leading up to them.

III

In September 1950 the Foreign Ministers of Great Britain, France, and the United States met in New York to discuss, among other things, 'appropriate measures such as the termination of the state of war and further relaxation of occupation controls, for accelerating the restoration of the position of Germany as a member of the family of nations'. A statement issued on 19 September 1950[2] reads, in part, as follows:

'Pending the unification of Germany, the three Governments consider the Government of the Federal Republic as the only German Government freely and legitimately constituted and therefore entitled to speak for Germany as the representative of the German people in international affairs.

'They reaffirm their desire . . . to integrate the Federal Republic in the community of free nations.

'In the spirit of the new relationship which they wish to establish with the Federal Republic, the three Governments have decided, as soon as action can be taken in all three countries in accordance with their respective constitutional requirements, to take the necessary steps in their domestic legislation to terminate the state of war with Germany.

'This action will not affect the rights and status of the three Powers in Germany, which rest upon other bases. It will, however, create a firmer foundation for the developing structure of peaceful and friendly relationships and will remove disabilities to which German nationals are subject. It is hoped that other nations will find it possible to take similar action in accordance with their constitutional practices. . . .'

It is interesting to note the slight nuance between the French[3] and English texts of this statement. Whereas, according to the English text, the three governments 'have decided . . . to take the necessary steps in their domestic legislation', &c., the French

[1] Décret No. 51–883 of 9 July 1951: *Journal Officiel*, 83 (1951), pp. 7502 ff.
[2] *U.S. Department of State Bulletin*, 23 (1950), pp. 530 ff.
[3] Quoted in the French Foreign Minister's *Rapport*: see above, n. 1.

text reads: '. . . prendraient *unilatéralement*[1] toutes dispositions', &c. And while the purpose of these steps was, according to the English text, simply 'to terminate the state of war with Germany', the French used the following language: 'pour mettre fin à l'état de guerre, dans la mesure où il subsiste sur le plan de sa propre législation interne et pour mettre fin à ses conséquences'.

By the time these decisions were taken, the relations between the Occupying Powers and Germany had already undergone considerable modifications. Further changes took place before the decisions were carried out. Thus a Presidential Proclamation of 31 December 1946[2] permitted the resumption of commercial relations between the United States of America and Germany. Similarly, the resumption of commercial and financial relations between Germany and the United Kingdom was authorized by British legislation of 23 March 1949.[3] In September 1949, the three Western Zones of Occupation were fused into the Federal Republic of Germany with a Government of its own operating under the provisions of the Occupation Statute[4] and a Constitution (the Basic Law). Simultaneously, Military Government in Western Germany was replaced by the Allied High Commission, whereas the administrative functions of the Soviet Military Administration in the Eastern Zone were transferred, on 7 October 1949, to a Provisional Government of a new German Democratic Republic.[5] The Federal Republic was admitted to certain international organizations.[6] In an exchange of letters with the Allied High Commission the Federal Government confirmed, in March 1951, its responsibility for the pre-war external debts of the German Reich.[7] It also undertook to co-operate in the equitable apportionment of scarce materials, products, and services required for the common defence.[8] The Occupation was revised,[9] a German Ministry of Foreign Affairs was established, and German consulates were opened in the principal Western capitals.[10] The latter measures were direct consequences of the New York Conference referred to above. These developments did not mean that peace had been silently restored between the Western Powers and Germany before the Declarations were made to terminate the state of war. The British Foreign Office had made it clear that the United Kingdom and Germany were in a state of war as long as no peace treaty or declaration of the Allied Powers had terminated it. This was also the opinion of English and American courts in cases involving the status of Germany.

IV

The termination of the state of war with Germany was declared by the Western Powers in 1951.[11] On 9 July 1951 the Foreign Secretary made a statement in the House of Commons[12] informing it that

'steps are being taken in our country, the United States and France to terminate the state of war with Germany as from today . . .'.

[1] Author's italics.
[2] *Dept. of State Bull.*, 16 (1947), p. 77; Proclamation 2714 (12 Federal Register 1).
[3] Referred to in the British Notice of 9 July 1951. See below, p. 440, n. 1.
[4] For the text of the Occupation Statute see *Dept. of State Bull.*, 20 (1949), p. 500.
[5] Developments in Eastern Germany are described in *Dept. of State Bull.*, 21 (1949), pp. 761 ff.
[6] Organization for European Economic Co-operation, European Postal Union, Council of Europe.
[7] *Dept. of State Bull.*, 24 (1951), pp. 445 ff.
[8] Ibid., p. 449.
[9] Ibid., p. 447.
[10] Allied High Commission Decision of 7 March 1951. See ibid., pp. 448 ff.
[11] The state of war with Austria had already been terminated by a unilateral Declaration. Cf. *The London Gazette*, No. 38072, 16 September 1947, p. 4339, &c.
[12] 490 *House of Commons Deb.*, 5 s., cols. 39 ff.

The *London Gazette* published on that day the following Notice:[1]

'*It is notified that the formal state of war with Germany is terminated as from four o'clock p.m. today, the 9th July, 1951.*

'On the instruction of His Majesty's Principal Secretary of State for Foreign Affairs the United Kingdom High Commissioner in Germany addressed on 9th July, 1951, a communication to the Federal Government of Germany in the following terms: . . .

' "His Majesty's Government . . . bearing in mind . . . that . . . the formal state of war with Germany has continued to subsist so far as the municipal law of the United Kingdom is concerned, and will so continue until the appropriate action is taken by His Majesty's Government to terminate it,

' "that through circumstances beyond German control it has yet proved impossible to conclude a treaty which would dispose of questions arising out of the state of war with the German Reich,

' "have determined that without prejudice to the Occupation Statute, or to the decision of questions the settlement of which must await the conclusion of a treaty, the formal state of war between the United Kingdom and Germany shall be immediately terminated.

' "His Majesty's Government . . . must reserve the right to retain any money or property subject to control by virtue of Trading with the Enemy legislation or in the custody of any prize court but desire to recall that under that legislation no obstacle has been placed since the 23rd March, 1949, in the way of the resumption of full commercial and financial dealings between persons in the United Kingdom and persons in Germany or of the acquisition of property not then subject to control, and this position will remain unaltered. . . ." '

This communication, it will be noted, spoke of the 'formal state of war' with Germany, which had 'continued to subsist so far as the municipal law of the United Kingdom is concerned'; it passed silently over the state of war with Germany in international law. There was nothing in the British attitude to indicate that this international state of war had ended before the publication of the Notice in the *London Gazette*. The term 'formal state of war', which is not defined in the body of the Notice, must, therefore, be understood to include the international state of war. A second point deserving comment related to the 'circumstances beyond German control', owing to which 'it has yet proved impossible to conclude a treaty. . .'. This was an allusion to the fact that for political reasons, and *faute de mieux*, the state of war could be terminated only by unilateral action. Thirdly, the communication stipulated not only the right of the British Government to retain any money or property subject to control by virtue of Trading with the Enemy legislation; it made pre-war contracts subject to a similar reservation. Beyond that, it expressly reserved the Occupation Statute and, generally, the decision of 'questions the settlement of which must await the conclusion of a treaty'.

A French *Décret* of the same day[2] is the counterpart of the United Kingdom Notice. It is entitled *Décret . . . mettant fin aux conséquences de l'état de guerre en ce qui concerne le statut des ressortissants allemands en France*, and reads as follows:

'Art. 1er. — A dater de la publication du présent décret, les ressortissants allemands ne seront plus réputés ennemis.

'Art. 2. — Le présent décret ne porte pas atteinte à la validité des mesures qui ont été ou seront prises sur les biens, droits et intérêts allemands, en application des accords internationaux auquels la France est partie, ou afin de permettre l'exécution desdits accords.

[1] *The London Gazette*, No. 39279 of 9 July 1951.

[2] See above, p. 438, n. 1.

'Art. 3. — Le ministre des affaires étrangères est chargé de l'exécution du présent décret, qui sera publié au Journal Officiel de la République française.'

The Decree was accompanied by a *Rapport* of the French Minister of Foreign Affairs expounding the French attitude with regard to some of the legal questions involved. The following was significant:

'Il convient de souligner . . . que ces mesures doivent s'appliquer à tous les ressortissants allemands, sans exception.'

This was in contrast with the attitude of the British Government. The Secretary of State, when he was asked in the House of Commons whether the new state of peace was a peace with the whole of Germany or only with the Federal Government at Bonn, avoided all reference to Eastern Germany. He said: 'This is in relation to the Federal Government of Germany. . . .'[1]

The title of the French *Décret* is self-explanatory: 'mettant fin aux conséquences de l'état de guerre en ce qui concerne le statut des ressortissants allemands'. The state of war itself having terminated, in the French view, with the surrender of Germany, all that remained was to put an end to certain consequences of the former state of war—in other words, to terminate the enemy status of German nationals in France and treat them again like any other aliens.

In the United States, constitutional requirements necessitated appropriate legislation to be passed before the President could issue a proclamation to terminate the state of war. It is for this reason that the United States was behind France and Great Britain in the termination of the state of war. On 9 July 1951, the day on which the British Notice and the French *Décret* were published, the American President addressed a letter to the Vice-President (who is the President of the Senate) and a similar message to the Speaker of the House of Representatives, inviting them to lay the matter before the Congress.[2] The President's letter contained a fairly comprehensive review of the Allied policy towards Germany since the Allied victory. The political factor which had 'made impossible for the time being the arrangement of a final peace settlement' was stated more explicitly in this document than in the Foreign Ministers' New York statement and in the British Notice:

'We went forward with a clearly stated policy which anticipated that after a period of Allied occupation and reconstruction we would be able, together with our Allies, to conclude a treaty of peace with a newly-established German government. . . . We have never deviated from this policy. Neither have our British and French Allies. Unfortunately for all of us, however, and especially for the people of Germany, Soviet Russia has actively prevented the growth of a representative democratic government in a unified Germany, and has thus made impossible for the time being the arrangement of a final peace settlement. . . .'

The Presidential Message referred to the Foreign Ministers' New York Conference and repeated the insistence on safeguards and reservations concerning American rights after the termination of the state of war. The benefits accruing from ending the state of war were defined as follows:

'Germans who wish to travel or do business here will receive the status accorded to nationals of other friendly governments. They will no longer be classed as enemies. While Germans have been permitted to have commercial relations with this country since the Presidential proclamation of December 31, 1946, . . . German citizens are still subject to

[1] 490 *House of Commons Deb.*, 5 s., col. 42.
[2] *Dept. of State Bull.*, 25 (1951), pp. 90 ff.

certain disabilities, particularly with respect to suits in United States courts. General disabilities of this kind will be eliminated by the termination of the present state of war.'

The result of the President's letter was that on 19 October 1951 the Congress declared the state of war to be terminated on a date to be proclaimed by the President.[1] Five days later the President issued a Proclamation terminating the state of war.[2]

The Declarations here reviewed, far from being merely declaratory, seem to have constituted the new state of peace. The French *Décret* expressly set aside the previous situation and created a new status for German nationals in France. The United Kingdom Notice and the American Proclamation, by setting definite dates for the termination of the state of war, made it known that a new status existed with effect from a given day and not before. No clear-cut answer can be given to the question whether a unilateral declaration must be notified to and accepted by the former enemy government in order to become effective. The question must, in each case, be examined in the light of military and legal realities. Two sets of circumstances may be distinguished: (1) If the issue of the war has not been militarily decided and if, therefore, there are no conquering and defeated parties, then it is not enough for one side to declare the state of war to be ended, as the Soviet Russian Government did on 10 February 1918.[3] The other side, unless it recognizes such unilateral action, may resume hostilities, as Germany did on 18 February 1918 against Russia. In this case, therefore, acceptance by the other belligerent of the unilateral declaration is required for the declaration to become effective; (2) If the war results in the complete defeat or unconditional surrender of one opponent, the formal end of the war depends on the decision of the victor.

D. Ottensooser

MILITARY NECESSITY IN WAR CRIMES TRIALS

I. *Introductory*

The plea of military necessity was raised in several war crimes trials held after the Second World War. While it did not, as a defence to a criminal charge, enjoy the prominence accorded to the highly controversial plea of superior orders, the occasions prompting its use are sufficiently noteworthy to warrant a somewhat more detailed treatment of the subject than is to be found in textbooks. It is proposed to consider here the extent to which various theories of military necessity advanced by writers can, in the light of decisions of war crimes tribunals, be said to form part of the law of war. At the outset, it is important to distinguish military necessity from necessity in the interest of self-preservation.[4] It is probably not correct to maintain, as do the majority of writers, that every state has a fundamental *right* of self-preservation. Nevertheless, it is accepted that certain breaches of international law involving the use of force, committed in self-defence, are not absolutely prohibited. But, as Oppenheim points out, such acts of violence 'are excused in cases of *necessity* only'.[5] On the other hand, military necessity—or necessity in war, as it is sometimes called—is usually invoked as a reason

[1] Joint Resolution approved 19 October 1951: Pub. Law 181, 82nd Cong.

[2] *Dept. of State Bull.*, 25 (1951), p. 769; Proc. 2950, 16 *Fed. Reg.* 10915. Other belligerents, too, declared their state of war with Germany to be terminated, e.g. Egypt on 17 May 1951; Italy and Mexico on 7 July, 1951; Australia, New Zealand, and South Africa on 9 July 1951; the Netherlands on 23 July 1951; Peru on 17 September 1951. See the Official Gazettes of these countries.

[3] See Hyde, *International Law* (2nd rev. ed.), vol. iii, p. 2386, n. 4.

[4] See Oppenheim, *International Law*, vol. i (7th ed. by Lauterpacht, 1948), pp. 265–6.

[5] Ibid.

for the abrogation by a belligerent of the rules of law applicable to the conduct of hostilities.

The meaning to be assigned to the two conceptions has become somewhat obscured owing to the frequent use of the term 'necessity in self-preservation' to justify acts of a hostile nature carried out by the state primarily as a matter of military expediency in time of war against the subjects or property of another state. The shelling of Copenhagen and the seizure of the Danish fleet in 1807 by British naval forces, the violation in August 1914 of Belgian and Luxemburg neutrality by Germany, the sinking in July 1940 of a substantial part of the French fleet in the port of Oran, are instances of belligerent action pursued under the guise of necessity in self-preservation. While it might be asserted that the necessity for such operations was of considerable military importance, the phrase 'necessity in self-preservation' is more properly employed to describe a danger or emergency of such proportions as to threaten immediately the vital interests, and, perhaps, the very existence, of the state itself. Military necessity should be confined to the plight in which armed forces may find themselves under stress of active warfare. Thus, a Netherlands court of first instance has decided that the detention and ill-treatment, on account of race or religion, of civilian inhabitants of occupied enemy territory does not amount to a 'military operation' and cannot, therefore, be justified as 'necessity of war'.[1]

The length to which reliance on military necessity has been stretched can be seen in *Re Altstötter and Others*[2], decided in 1947. Lautz, who was the Chief Public Prosecutor at the People's Court in Berlin, in a secret communication to the *Reich* Minister of Justice proposed that German courts should try and convict Polish nationals, including one Golek, for high treason in respect of acts carried out in Poland before the war. The acts alleged to be treasonable included the institution of proceedings against Polish citizens of German blood in which the latter were charged with having participated in subversive activities against Poland. Lautz now endeavoured to support such action by pleading military necessity. However, the United States Tribunal held that 'the prosecutions which were proposed by Lautz could not be justified upon any honest claim of military necessity. . . . The prosecution of the Pole, Golek, would constitute a palpable violation of the laws of war, and any official participating in such a proceeding would be guilty of a war crime under Control Council Law No. 10'.[3]

II. *Theories as to the nature of military necessity*

The term 'military necessity in warfare' and in the rules appertaining thereto has been used in at least three meanings. In the first place, the term has been used to signify those circumstances arising from a state of war which, according to international law,

[1] *In re Zühlke, War Crimes Reports*, 14 (1949), p. 139. These Reports have been selected and prepared by the United Nations War Crimes Commission and appear in fifteen volumes (1946–9) published by Her Majesty's Stationery Office. See also *In re Goeth*, ibid., 7 (1948), p. 1, where the plea of military necessity for the extermination and ill-treatment of inhabitants of occupied enemy territory confined in a concentration camp was rejected by the Supreme National Tribunal of Poland.

[2] *War Crimes Reports*, 6 (1948), p. 1.

[3] *War Crimes Reports*, 6 (1948), p. 63. It has also been held that the plunder and exploitation of property, the deportation to slave labour of a large part of the population of occupied territory, and the employment of prisoners of war in work prohibited by the Hague and Geneva Conventions, could not be justified by conditions of extreme economic necessity which, the defence contended, threatened to paralyse the entire German war effort: see *In re Krupp and Others*, ibid., 10 (1949), pp. 138–9. See also *In re Flick and Others*, ibid., 9 (1949), p. 22. In evidence before the International Military Tribunal at Nuremberg, Field-Marshal von Manstein claimed that military necessity justified the conscription into labour battalions of women from occupied Russian territory: *Proceedings* (H.M.S.O. paper edition), Part 21, p. 79.

justify all measures of regulated violence indispensable for bringing about the submission of the enemy.[1] In other words, it refers to the nature and degree of armed force that may lawfully be exercised in the destruction of enemy life, limb, and property.[2] Lieber thought of military necessity in this sense.[3] Even before recognized rules of warfare became established a belligerent was entitled by military necessity, subject only to the dictates of humanity and chivalry, to apply any amount and kind of force calculated to secure the defeat of the enemy with the least possible expenditure of time, life, and money. Acknowledged as lawful were such acts as the killing, wounding, and capturing of enemy combatants, the seizure and destruction of certain property, the obstruction and demolition of communications, and the appropriation of food and material requisite for the maintenance and security of the occupying belligerent. But military necessity has never sanctioned the infliction of suffering out of mere spite or revenge, or in order to satisfy a lust to kill. Neither has military necessity permitted maiming and wounding otherwise than in combat, or the use of poison, or wanton devastation.[4] Nevertheless, international law does not attempt to enumerate those particular acts of warfare which, in consequence of military necessity, may lawfully be committed on all or various occasions. As the United States memorandum attached to the report of the League of Nations Commission on Responsibilities (29 March 1919) pointed out: 'The assertion by the perpetrator of an act that it is necessary for military reasons does not exonerate him from guilt if the facts and circumstances present reasonably strong grounds for establishing the needlessness of the act or for believing that the assertion is not made in good faith.'[5]

The notion of military necessity, as thus understood, does not indicate a situation in which a belligerent is entitled to disregard the duty of observing the laws of war and formulate excuses for lawlessness. It merely proscribes, indirectly, what might otherwise constitute lawful acts of warfare by laying down the principle that 'no more force, no greater violence, should be used to carry out an operation than is absolutely necessary in the particular circumstances'.[6]

Secondly, military necessity has occasionally been taken to denote those exceptional circumstances of practical necessity contemplated by express reservations to be found in several Articles of the Hague Regulations and other Conventions in regard to acts otherwise prohibited. The general principle is that conventional and customary rules of warfare are always binding upon belligerents and cannot be disregarded even in case of military necessity. The Preamble of Hague Convention No. IV of 1907 states that the Regulations following were formulated with 'a desire to diminish the evils of war, so far as military requirements permit'. Consequently, many writers considered that military necessity was discounted when the rules of warfare were drawn up, and that their strict observance is only to be relaxed when reprisals are warranted. At the trial of Field-Marshal von Manstein it was submitted by the defence that the principles underlying the Hague Regulations must be adjusted to the necessities of war. 'The proposition', said the Judge Advocate in his summing-up, 'may be summarized thus:

[1] See, for example, Section XIV of the *Instructions for the Government of Armies of the United States in the Field*, General Orders, No. 100, 24 April 1863; Moore, *A Digest of International Law* (1906), vol. vii, p. 178. And see the United States *Rules of Land Warfare*, 1940, Nos. 22 and 23; and Hyde, *International Law* (1945), vol. iii, p. 1801.

[2] Ibid., p. 1802.

[3] Code of 1863, Articles 13 and 38: see Graber, *The Development of the Law of Belligerent Occupation, 1863–1914* (1949), p. 311.

[4] See *In re List and Others, War Crimes Reports*, 8 (1949), p. 34.

[5] See *American Journal of International Law*, 14 (1920), pp. 150–1.

[6] Phillipson, *International Law and the Great War* (1915), p. 132.

The purpose of war is the overpowering of the enemy. The achievement of this purpose justifies any means including, in case of necessity, the violation of the laws of war, if such violation will afford either the means to escape from imminent danger or the overpowering of the opponent.'[1] But he advised the Tribunal that the doctrine has no application to the laws of war except where the latter are actually qualified by explicit reference to military necessity; and that it had already been taken into consideration when the rules were formulated. With regard to Article 23 (*g*) of the Hague Regulations[2] he said: 'If the necessities of war were an overriding consideration to be taken into account in regard to all the articles of the Convention, obviously it would be quite unnecessary to make a special provision to that effect in Article 23 (*g*).'[3]

Again, in *Re Krupp and Others*, the Tribunal said:

'The contention that the rules and customs of warfare can be violated if either party is hard pressed in any way must be rejected on other grounds. War is by definition a risky and hazardous business. . . . It is an essence of war that one or the other side must lose, and the experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short these rules and customs of warfare are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.'[4]

The danger of leaving to the judgment of an individual, whom the laws of war seek to restrain, the decision to carry out acts regarded as normally improper is clearly manifest. In the words of Hyde: 'It serves to give an appearance of lawlessness to acts which in reality conform to what is required. It allows too much to rest upon the character, temperament, and training of a commanding officer and permits, in consequence, opposing armies under similar circumstances to resort to widely differing practices without exposing either to just charges of misconduct.'[5]

However, it is the third interpretation of military necessity which has given rise to widespread controversy and has caused the expression to be regarded by so many with suspicion and opprobrium. The source of this concept of military necessity is to be found in the German maxim *Kriegsraison geht vor Kriegsmanier*, formulated at a time when warfare was regulated by usages alone and not by customs and conventional rules. The more moderate protagonists of this school agree that laws and customs of war must ordinarily be respected but contend that the obligation may be displaced by urgent

[1] *Transcript*, p. 3139.

[2] This Article provides that it is particularly forbidden 'to destroy or seize enemy property unless such destruction or seizure be imperatively demanded by the necessities of war'.

[3] *Transcript*, p. 3140.

[4] *War Crimes Reports*, 10 (1949), pp. 138–9. During the proceedings of the International Military Tribunal at Nuremberg, counsel for Rosenberg claimed that the looting of a large number of Jewish-owned houses in France and the transportation of furniture to Germany were 'justified by the state of emergency'; and that 'his [Rosenberg's] procedure of confiscating furniture, in view of the devastating effects of air warfare against Germany, was not contradictory to the customs among civilised peoples, the laws of humanity, and the demands of the public conscience': *Proceedings*, Part 18, p. 264. The perilous state of the German economy, following upon the entry of the United States into the war, was put forward by counsel for Frank as a pretext for the deportation to forced labour of Polish workers: ibid., pp. 292–3. In *Re Rauter, War Crimes Reports*, 14 (1949), p. 89, the accused pleaded unsuccessfully that the deportation of Dutch students to Germany was a military necessity seeing that they belonged to those classes of the population liable to be conscripted for service in the Dutch resistance movement, and that a landing of Allied forces in the Netherlands was considered imminent: ibid., p. 106.

[5] Op. cit., vol. iii, p. 1802.

and overwhelming necessity.[1] When the observance of rules of warfare endangers the safety of armed forces the limitations which they impose on hostile licence may be disregarded. This proposition is said to be based on a fundamental right of self-preservation and purports to acknowledge the futility of demanding strict compliance with rules inconsistent therewith. The doctrine has been supported on the ground that commanders will invariably act on it despite any rule of law to the contrary and, furthermore, that the plea of self-preservation, formally recognized by some systems of municipal law as a defence to a criminal charge, must clearly apply with even greater force in war, when much more is at stake.[2]

In two cases, decided after the First World War by the German *Reichsgericht*, the Court held that, on the ground of necessity in the interest of self-preservation (which, it was claimed, had arisen in consequence of the economic blockade imposed upon Germany by the Allies with the aim of starving her), there was justification for the requisitioning and subsequent disposal—contrary to the provisions of Hague Convention No. IV of 1907—of private property in Belgium belonging to a local inhabitant.[3] The blockade was regarded by the Court as unlawful, 'placing Germany in a position in which she had, as a matter of necessity, to adopt measures of an unusual nature'. It appears, however, that the measures taken by Germany were treated by the Court as in the nature of a reprisal rather than as the outcome of necessity.

In the *German High Command Trial*[4] the United States Military Tribunal observed that were military necessity to confer on a belligerent the right to do anything that contributed to the winning of the war 'it would eliminate all humanity and decency and all law from the conduct of war and it is a contention which the Tribunal repudiates as contrary to the accepted usages of civilized nations'.[5] In the *Ministries Trial* it was held that military necessity could not be invoked by Germany to justify the invasion of European countries carried out in violation of international law. The Tribunal said:

'By resorting to armed force, Germany violated the Kellogg-Briand Pact. It thereby became an international outlaw and every peaceable nation had the right to oppose it without itself becoming an aggressor, to help the attacked and join with those who had previously come to the aid of the victim. The doctrine of self-defence and military necessity was never available to Germany as a matter of international law, in view of its prior violation of that law.'[6]

III. *The treatment of the plea of military necessity by War Crimes Tribunals after the Second World War*

After the Second World War, the plea of military necessity was considered by war crimes tribunals largely in connexion with the following two categories of cases:

(a) *The plea of military or operational necessity in regard to the treatment of prisoners of war and unarmed enemy persons.*

It is a firmly established rule of international law that a prisoner of war shall be

[1] See Oppenheim, op. cit., vol. ii (7th ed., 1952), pp. 231–2, and the authorities there cited; Westlake, *International Law*, vol. ii (1913), p. 127; Garner, op. cit., vol. ii, pp. 195–6.

[2] Lueder in Holtzendorff's *Handbuch des Völkerrechts*, sections 65–66, in what Westlake regards as 'the classical passage on the doctrine'. See the criticism by Westlake, who describes these grounds as 'highly pernicious': op. cit., vol. ii, p. 127. It must also be remembered that those systems of municipal law which recognize the plea of self-preservation usually limit its scope by safeguards prescribed by the law and given effect to by the municipal courts.

[3] *Requisitions (Germany) Cases*, reported in *Annual Digest and Reports of Public International Law Cases*, 1919–22, Case No. 296, and 1923–4, Case No. 230.

[4] *In re von Leeb and Others, War Crimes Reports*, 12 (1949), p. 1.

[5] Ibid., p. 93.

[6] *In re Weizsaecker and Others, Transcript*, p. 28114.

humanely treated and protected against acts of violence, and that it is unlawful to kill or wound an enemy who, having laid down his arms, has surrendered at discretion.[1] But it has been suggested that an exception may be allowed when 'from special circumstances it is impossible for a force to be encumbered with prisoners without danger to itself'.[2] There is little doubt, however, that if such a usage existed in the past it became extinct after the coming into force of the Hague Convention of 1899. Thus the plea of military necessity was rejected by a United States Military Commission in 1945 when considering the execution of a prisoner of war.[3] Of the two persons accused, Thiele was a junior officer in the German army, and Steinert was a private. The evidence showed that a United States officer had been wounded and taken prisoner by troops under the command of Thiele. Captain Schwaben, Thiele's superior officer, ordered the latter to execute the prisoner. Thiele, in turn, passed on the order to Steinert, who carried it out. It is not clear from the brief report of the trial what circumstances were relied upon in support of the plea of military necessity. It appears, however, that at the time of the offence the unit to which the accused belonged was closely surrounded by United States troops, from whom the Germans were hiding. It may therefore be surmised that the defence was attempting to show that the immediate danger threatening the security of the unit justified the execution of the prisoner seeing that it would not be practicable, if the unit hoped to escape detection, to burden itself with a prisoner of war or, alternatively, it was feared that in the confusion the prisoner might make his escape and inform his own forces of the location and size of the German unit.

The plea of operational necessity was raised in the *Peleus Trial*[4] in circumstances bearing some relation to those of the foregoing case. Eck, one of the accused, was the commander of a German submarine which, on the night of 13/14 March 1944, had sunk an Allied merchant-vessel, the *Peleus*, in the middle of the Atlantic Ocean. Most of the members of the crew of the *Peleus* succeeded in reaching two rafts and floating wreckage. The submarine having surfaced, one of the *Peleus* was hailed and interrogated as to the name of the vessel, its destination, and other particulars. Several members of the crew of the submarine, acting under the orders of Eck, then proceeded to open fire with a machine-gun and to throw grenades at those survivors who were still in the water or on the rafts. All but three of the survivors were killed outright or subsequently died of their wounds. The three survivors who escaped death remained on the raft for more than twenty-five days before being rescued. Eck pleaded that he did not act out of cruelty or revenge but that in order to safeguard the submarine it was operationally necessary to eliminate all traces of the *Peleus*.[5] He contended that the loss of submarines had, in the past, been caused by the presence of survivors; that there was no possibility

[1] See Articles 4 and 23 (*c*) of the Hague Regulations, and Article 2 of the Geneva Prisoners of War Convention of 1929.

[2] Hall, *International Law* (8th ed. by Pearce Higgins, 1924), p. 474, and the authorities there cited.

[3] *In re Thiele and Steinert, War Crimes Reports*, 3 (1948), p. 56.

[4] *War Crimes Reports*, 1 (1947), p. 1.

[5] In his evidence before the International Military Tribunal at Nuremberg Admiral Raeder referred to a memorandum concerned with the intensification of submarine warfare prepared by the German Naval Operation Staff and submitted to Hitler on 15 October 1939. 'That memorandum', said Admiral Raeder, 'contained near the beginning the sentence referring . . . to the highest ethics of warfare and (enjoining) adherence to international law, and the basing of all military measures on existing rules of warfare wherever possible. But when this is not possible or when by deviation it is possible to achieve decisive military results, and one can take the responsibility for this deviation, then in the case of necessity one must depart from existing international law. That means that a new international law may have to be developed.' See *Proceedings*, Part 14, p. 174.

of saving the survivors seeing that it was against orders to take them on board the submarine; that the rafts constituted a danger to his security as they would assist air-reconnaissance by marking the exact spot of the sinking; and that it was commonly known that rafts could be provided with modern signalling apparatus. He therefore decided to destroy all pieces of wreckage and rafts. He asserted that at the time of opening fire no survivors were to be seen on the rafts.

In his summing-up the Judge Advocate declared that it was a fundamental usage of war that the killing of unarmed enemies was forbidden. To kill helpless survivors of a torpedoed ship was a flagrant breach of the law of nations. He advised the Tribunal that it was entitled to adopt the statement of principle contained in *The Llandovery Castle*,[1] decided in 1921 by the German Supreme Court, as the starting-point of its investigation in the present case. As to the defence of operational necessity the Judge Advocate admitted that, although the matter was controversial, circumstances might arise in which a belligerent would be justified in killing an unarmed person for the purpose of saving his own life. But he pointed out that in the present case the accused had cruised about the site of the sinking vessel for five hours instead of using his speed to get away as quickly as possible. The Judge Advocate asked the Tribunal to consider whether the use of a machine-gun to fire at substantial pieces of wreckage and rafts could be said to be an effective way of destroying all trace of the sinking; and whether it was not obvious that in any event a patch of oil would have been left which would have indicated to any aircraft that a ship had recently been sunk.

The Tribunal found Eck guilty and sentenced him to death. Since no judgment was delivered it is not possible to say whether or not the Tribunal was of the opinion that operational necessity might, in certain limited circumstances, justify the killing of unarmed enemy persons. However, it may be inferred from the nature of the summing-up by the Judge Advocate that the Tribunal arrived at the conclusion that the safety of the submarine and its crew could have been effectively secured without resorting to such violent and inhuman measures.

At the trial in 1947 of the Japanese General, Baba Masao,[2] the defence contended that the evacuation, in December 1944 and May 1945, of about 1,000 British and United States prisoners of war from a camp in Borneo was operationally necessary. The prisoners were transferred on foot from Sandakan to Ranau, a distance of 165 miles over difficult country, in two parties. The order for the march had been given before the accused took over the command of the Japanese 37th Army in Borneo, but he admitted in evidence that he was aware of the poor state of health of the prisoners and that, although he had ordered a previous reconnaissance of the country through which the latter were to march, he had failed to countermand the orders for the march. During the march a large number of prisoners died as a result of the hardships they had to suffer, many were severely ill-treated, and some who were unable to keep up with the marching column were shot by the guards on orders from the officer in charge of the party. Although the accused received a report of this march early in 1945, he ordered the evacuation of the remaining 540 prisoners over the same route in May 1945. The second march proved even more disastrous than the first. Baba Masao was found guilty and sentenced to death. No judgment was delivered by the Court. The Judge Advocate does not appear to have directed his attention to the question of the military necessity of the

[1] *Annual Digest of Public International Law Cases*, 1923–4, Case No. 235. Although the facts in *The Llandovery Castle* were similar to those in *The Peleus* the submarine commander in the former case had attempted to eliminate all traces of the sinking of the hospital ship, not as a matter of operational necessity, but in order to conceal his criminal act.

[2] *In re Baba Masao, War Crimes Reports*, 11 (1949), p. 56.

evacuation. The charge alleged that the accused, 'while commander of armed forces in Japan . . . unlawfully disregarded and failed to discharge his duty as a . . . commander to control the conduct of the members of his command whereby they committed brutal actrocities and other high crimes'.

The prosecution did not allege that the evacuation, as such, was unlawful even although it necessarily involved for the prisoners conditions of extreme hardship and privation. Rather it would seem that the accused was charged with responsibility for the ill-treatment of the prisoners during and after the marches. This is borne out by the summing-up of the Judge Advocate, in the course of which he quoted several passages from the Judgment of the United States Supreme Court in *Re Yamashita*, decided in 1945,[1] concerning the duty of a military commander to take appropriate steps to prevent his subordinates from committing acts of brutality and otherwise ill-treating prisoners of war in their custody. The Judge Advocate said: 'In order to succeed the prosecution must prove . . . that war crimes were committed as a result of the accused's failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or wilfully disregarding them, not caring whether this resulted in the commission of a war crime or not.'

(b) *Deportation of civilian inhabitants from and devastation of property in occupied enemy territory.*

This was, perhaps, the most important phase of warfare in which the plea of military necessity was encountered. The so-called scorched-earth policy involved the deportation of inhabitants from their homes and the devastation of property in occupied enemy territory carried out by German forces during a large-scale retreat.

One of the charges against Field-Marshal von Manstein was that between 16 February 1943 and 1 April 1944 he had issued orders for the mass deportation and evacuation of inhabitants, the seizure of cattle and foodstuffs, and the wanton destruction and devastation of public and private buildings and other objects of economic value in the course of a forced retreat from occupied Russian territory.[2] The accused maintained that the exigencies of the situation were determined by the military necessity of evacuating a combat zone or an entire battle zone; that in a country as thickly populated as the Ukraine it was necessary for the security of the troops that the population should be removed from the battle or combat zone; and that to do otherwise would have been to encourage espionage and guerrilla activities. He claimed also that it was essential to deprive the enemy of labour potential seeing that he was conscripting all able-bodied men into the army and even utilizing women and children; that the machinery which was removed, a large amount of which had been brought by the Germans themselves into the area, would have contributed to the enemy's war effort;

[1] *Annual Digest and Reports of Public International Law Cases*, 1946, Case No. 111.

[2] Count seventeen of the Indictment, *Transcript*, p. 80. See also the evidence in this connexion given by von Manstein before the International Military Tribunal at Nuremberg: *Proceedings*, Part 21, pp. 78–79. During the First World War the Allies regarded the wanton destruction of property carried out on a large scale by the German Army in the course of its retreat from Flanders and France as a flagrant violation of the laws of war and as constituting an obstacle to the request of the German Government for an armistice. The German Minister of Foreign Affairs, in a communication of 20 October 1918, protested against the allegations of illegal warfare and stated that 'although for the covering of a retreat, destructions will always be necessary and are in so far permitted by international law, German troops are under the strictest instructions to spare private property and to exercise care for the population to the best of their ability', and that 'where transgressions occur in spite of these instructions the guilty are being punished'. See Hackworth, *Digest of International Law* (1940–3), vol. vi, section 567, p. 180.

that the destruction of buildings, which was restricted to the minimum, was justified by the necessity not only of temporarily delaying the pursuit, but of holding up the advance of Russian forces until the winter; and that it was of decisive importance that billets and shelter should not be left available for Russian troops in the vicinity of the Dnjepr. In his summing-up the Judge Advocate quoted Article 23 (*g*) of the Hague Regulations and pointed out that the provision referred to the 'necessities of war' and not mere 'advantage', and that the necessity must be imperative. He continued:

'For a retreating army to leave devastation in its wake may afford many obvious disadvantages to the enemy and corresponding advantages to those in retreat. That fact alone, if the words in this Article mean anything at all, cannot afford a justification. Were it to do so, the Article would become meaningless. . . . It is essential that you should view the situation through the eyes of the accused and look at it at the time when the events were actually occurring. It would not be just or proper to test the matter in the light of subsequent events, or to substitute an atmosphere of calm deliberation for one of urgency and anxiety. You must judge the question from this standpoint: whether the accused, having regard to the position in which he was and the conditions prevailing at the time, acted under the honest conviction that what he was doing was legally justifiable.'

The Judge Advocate, however, directed the attention of the Tribunal to the documentary evidence, which, the prosecution suggested, tended to show that the devastation was not demanded by the imperative necessities of the moment, but was carried out in pursuance of a policy planned a considerable time in advance, 'a policy which the accused had in fact been prepared to carry out on two previous occasions and now was carrying out in its entirety irrespective of any question of military necessity'. The Judge Advocate said that the Tribunal should consider the scale of the destruction and that total devastation had been enjoined; even shrubs were to be burnt and wells rendered useless.[1] The defence cited two other instances when the 'scorched-earth' policy had been carried out and had been held by the courts concerned not to be criminal. The first took place in Finnmark, in the extreme north of Norway, the second was in issue in the *German High Command Trial.*

The Judge Advocate advised the Tribunal that the question of the deportation of the civilian population would have to be considered upon a different footing; that Article 23 (*g*) of the Hague Regulations had no application; and that it could not be defended, if at all, on the ground of military necessity.[2] The defence had argued that once it had been established that the devastation was justified, then the deportation was a necessary corollary; and that to leave the population in a devastated region would have been far worse, although any suggestion that the deportation had been motivated by feelings of humanity was expressly repudiated. The Judge Advocate, however, reminded the Tribunal of the documentary evidence, which appeared to show that one of the reasons for the deportation was to prevent the possibility of the advancing Russian forces utilizing this additional man-power, while the other reason was that the population was required for labour in Germany to replace workers lost as a result of the bombing of factories and towns there, and as labour for the army itself.

The Tribunal found the accused guilty of that part of the charge only which related to the mass deportation of the civilian population. As no Judgment was delivered it is not possible to say on what grounds the Tribunal acquitted the accused of devastation of property and the seizure of livestock and foodstuffs. Nevertheless, it is safe to infer that the defence of military necessity succeeded in respect of the devastation. On

[1] *Transcript*, pp. 3391–3.

[2] See, to the same effect, *In re List and Others, War Crimes Reports*, 8 (1949), pp. 66–67.

the other hand, it is clear that the deportation could never be sustained on such grounds.

Again, in the *German High Command Trial*[1] the Tribunal said:

'There is no international law that permits the deportation or the use of civilians against their will except on reasonable requisition for the needs of the army, either within the area of the army or after deportation to rear areas or to the homeland of the occupying power. This is the holding of the Nuremberg International Military Tribunal, and this consistently has been the holding of all the Nuremberg Tribunals. . . . There is no military necessity to justify the use of civilians in such manner by an occupying force.'[2]

With regard to devastation of property in occupied territory the Court said:

'The devastation prohibited by the Hague Rules and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature.'[3]

In the *Hostages Trial* one of the accused, General Rendulic, had been charged with the wanton devastation of property in the province of Finnmark, Norway, during the retreat of the German XXth Mountain Army commanded by him. He claimed that in view of the military situation as it then appeared to him it was necessary to carry out this policy of devastation. The evidence[4] showed that on 3 September 1944 Finland negotiated a separate peace with Russia and demanded the withdrawal of German troops from the country within fourteen days, a demand with which it was impossible to comply. In consequence, the two army corps to the south were obliged for three months to fight their way out of Finland. The retreat to the Norwegian border involved about 1,000 kilometres of travel over very poor roads in a severe climate. Russian forces began to attack almost immediately, with the result that the German troops had great difficulty in extricating themselves.

In its Judgment the Tribunal said:[5]

'It was with this situation confronting him that he carried out the 'scorched-earth' policy in the Norwegian province of Finnmark which provided the basis for this charge of the indictment. The record shows that the Germans removed the population from Finnmark. . . . A complete destruction of all housing, communications, and transport facilities was had. . . . There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal.'

The Tribunal pointed out that the Hague Regulations are mandatory and that the prohibitions contained therein 'are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary'; that 'the destruction of public and private property by retreating military forces

[1] *In re von Leeb and Others, War Crimes Reports*, 12 (1949), p. 1.
[2] Ibid., p. 93.
[3] Ibid., pp. 93–94.
[4] *In re List and Others*, ibid., 8 (1949), pp. 67–68.
[5] Ibid., pp. 68–69.

which would give aid and comfort to the enemy may constitute a situation coming within the exception contained in Article 23 (*g*)'.

The Tribunal continued:

'The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the 'scorched-earth' policy in Finnmark as a precautionary measure against an attack by superior forces.

'It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act.'

IV. *Conclusion*

The contribution of war crimes tribunals towards clarifying the meaning of military necessity has inevitably been determined by the nature of the cases brought before them. Nevertheless, if judicial precedent is to exercise an influence upon the development of the law of war, it is useful to extract some similarity of reasoning in the judgments that have been discussed. It seems likely that courts will be disinclined to enlarge the doctrine of military necessity beyond that countenanced by express reservations appearing in the Hague and Geneva Conventions. The general principle is that belligerents must always respect and observe customary and conventional rules of warfare. The first Article of each of the four Geneva Conventions of 1949 makes this clear.[1] The Hague and Geneva Conventions were framed with due regard to the practical demands of military necessity, and the situations in which the rules therein laid down may be relaxed are strictly limited. Courts will not easily be persuaded to augment of their own accord the agreed exceptions to the general rule.

N. C. H. Dunbar

THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RECENT DEVELOPMENTS

The European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome on 4 November 1950 on behalf of the Governments of Belgium, Denmark, France, the German Federal Republic, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Saar, Turkey, and the United Kingdom. Later in the same month, Greece and Sweden appended their signatures, thus completing the roster of the fifteen member states of the Council of Europe. Under the provisions of the Convention, the Contracting Parties undertake to secure to everyone within their jurisdiction ten rights and freedoms taken from the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948; included among these are security of the person, freedom from arbitrary arrest, freedom of thought, conscience and religion, freedom of expression, freedom of assembly, and freedom of association.[2] A European Commission of Human Rights is then created, to which any Contracting Party may refer any alleged breach of the Convention by another Contracting Party. The Commission has jurisdiction to

[1] This Article provides that the 'High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'.

[2] See this *Year Book*, 27 (1950), pp. 149–52.

investigate the complaint and use its good offices to effect a friendly settlement, if possible; in default of such a settlement it is to submit a report to the Committee of Ministers of the Council of Europe, which must then decide by a two-thirds majority whether a violation of the Convention has been committed and, if so, what remedial measures must be taken. The Parties undertake to abide by any decision of the Committee.[1]

On 20 March 1952 the same fifteen states concluded a Protocol to the Convention, containing a guarantee of three additional rights: the right of property; the right of parents to have their children educated in conformity with their own convictions; and the right of free elections by secret ballot.[2] Both the Convention and the Protocol require ten ratifications before they will enter into force. The Government of the United Kingdom was the first to ratify the Convention, having deposited its instrument of ratification with the Secretary-General of the Council of Europe on 8 March 1951. This was followed by the ratifications of Norway and Sweden in January and February 1952, and of Germany in December of that year; in the following four months ratifications were deposited by the Governments of the Saar, Ireland, Greece, and Denmark. Of these eight Governments all but Sweden and Germany also ratified the Protocol during the period from November 1952 to Ap il 1953.[3]

Apart from the obligations which result automatically from the act of ratification, there are two additional undertakings of an optional character which may be assumed as the result of express declarations made for the purpose. The first of these relates to what is generally known as the right of individual petition. This is the right of 'any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by one of the Contracting Parties of the rights set forth in the Convention', to address a petition to the Secretary-General of the Council of Europe for consideration by the Commission. Under Article 25 of the Convention such petitions may only be made if the Contracting Party against which the complaint is made has declared that it recognizes the competence of the Commission to receive such petitions.[4] The importance of this provision is apparent from the fact that it is improbable that one state will often be prepared to lodge complaints against a fellow-member of the Council of Europe alleging that it is denying human rights to 'persons within its jurisdiction', who will usually be its own nationals. Such cases may occur, but they will be rare. What is required for an effective guarantee of human rights is a procedure—analogous, in a way, to *habeas corpus*—which will grant a remedy to the individual himself whose rights are infringed. Such a remedy is afforded by the right of individual petition; but this may only be exercised in cases where the government concerned has made a declaration expressly accepting this procedure—and six such declarations must be made before the procedure is possible at all. How many governments will be prepared to expose themselves to this risk? Sweden was the first country to make adeclaration of this sort; it did so at the same time as it deposited its ratification of the Convention in January 1952. Similar action was taken by Ireland and Denmark in February and April 1953, though the Danish declaration was initially limited to a period of two years.

The second optional undertaking in the Convention relates to the jurisdiction of the European Court of Human Rights. Provision is made for the constitution of such a Court, which will have jurisdiction to hear all cases concerning the interpretation and

[1] See this *Year Book*, 27 (1950), pp. 152–3.
[2] See ibid., 28 (1951), pp. 360–5.
[3] Iceland ratified the Convention and Protocol in June 1953, and Luxembourg in September. The Convention thus came into force on 3 September 1953.
[4] See this *Year Book*, 27 (1950), pp. 154–5.

application of the Convention which the Contracting Parties or the Commission refers to it, subject to two conditions: these are that the Commission has been unable to bring about a friendly settlement, and that the Party or Parties concerned have agreed to accept the jurisdiction of the Court. This acceptance may be limited to the particular case at issue; but it may also result from a declaration made under Article 46 of the Convention to the effect that the Contracting Party 'recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the Convention.'[1] Eight declarations accepting the jurisdiction of the Court as compulsory are required before the judges are elected and the Court comes into existence (Article 56). By April 1953, two such declarations had been made—by Ireland and Denmark. The Irish declaration was unconditional; that of Denmark was limited to an initial period of two years.

Article 63 of the Convention and Article 4 of the Protocol provide that any Contracting Party may, by a notification to the Secretary-General of the Council of Europe, extend their application to any territory for whose international relations it is responsible. The Danish ratification was accompanied by such a notification, including Greenland within the territory to which the Convention and Protocol will apply; the Danish acceptance of the right of individual petition will also be valid for Greenland.

Reservations may be made by a Party in respect of any particular provision of the Convention or Protocol' to the extent that any law in force in its territory is not in conformity with the provision'. Reservations of a general character, however, are not permitted (Article 64). A number of reservations have in fact been made. The Norwegian Government has made a reservation relating to Article 9 of the Convention concerning freedom of thought, conscience and religion. Jesuits are banned in Norway under Article 2 of the Constitution of 1814 and are consequently excepted from the provisions of Article 9.

Article 7 of the Convention contains a guarantee against the retroactivity of the law and provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute an offence under national or international law at the time it was committed. The second paragraph of this Article continues: 'This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.' The German Federal Republic has entered a reservation relating to this paragraph, which it accepts only in so far as allowed by Article 103 of the Basic Law, which provides that 'an act is only punishable if it was so by law before the offence was committed'. Ireland, moreover, has made a reservation relating to Article 6 (3) (*c*) of the Convention providing for free legal assistance for persons without sufficient means. This provision is accepted only to the extent that such assistance is already furnished in Ireland.

There are two reservations to the Protocol. They both relate to its second Article, on the right of parents to have their children educated 'in conformity with their own religious and philosophical convictions'. The word 'philosophical' led to much heart-searching during the course of the drafting of the Protocol[2] and its inclusion in the final text provoked reservations by Greece and the United Kingdom. The former stipulated that the application given to this provision in Greece would conform to the relevant provisions of internal legislation; and the United Kingdom accepted it 'only so far as it is compatible with the provision of efficient instruction and training and the avoidance of unreasonable public expenditure'.

A. H. ROBERTSON

[1] Cf. this *Year Book*, 27 (1950), pp. 155–8.

[2] See ibid., 28 (1951), pp. 362–4.

DECISIONS OF ENGLISH COURTS DURING 1951–2 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

A. Public International Law

State Immunity—Dependent States—Conclusiveness of Statements of the Executive

Case No. 1. *Sayce* v. *Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*, [1952] 1 All E.R. 326. On 24 May 1950 a writ was issued in an action for damages for breach of contract against the Ameer of Bahawalpur. The Ameer entered a conditional appearance and took out a summons asking that the writ be set aside on the ground that he was entitled to immunity as the ruler of a sovereign state. On 13 October 1950 the Master ordered the writ to be set aside on this ground. In reaching this conclusion the Master had before him a letter from the Commonwealth Relations Office to the defendant's solicitors. The plaintiff appealed against the Master's decision and the matter came before Mr. Justice McNair in chambers. The learned Judge decided to adjourn the matter into open court for further argument. Meanwhile, a further letter was received from the Commonwealth Relations Office. This contained the following statement:

> '. . . until August 15, 1947, His Highness the Ameer of Bahawalpur was recognised by His Majesty as the ruler of the State of Bahawalpur, which was under the suzerainty of His Majesty. The territory of the State was not part of British India or of His Majesty's dominions, and neither the Ameer nor his subjects were subjects of His Majesty. Although the Ameer was not wholly independent, he exercised as ruler of his State various attributes of sovereignty including internal sovereignty, and his position was similar to that of the Gaekwar of Baroda who was held in *Statham* v. *Statham and Gaekwar of Baroda* ([1912] P. 92), to be a sovereign ruler entitled to immunity from suit.'

The letter then referred to the changes brought about by the Government of India Act, 1935, and by the Indian Independence Act, 1947, and also to various instruments of accession to the Federation of Pakistan executed by the Ameer. As a result of these developments, so the letter stated, the constitutional position of the Ameer and his state is now that the federal legislature of Pakistan (of which the Ameer is not a member) has power to make laws for Bahawalpur, with respect to certain matters, and that, with respect to certain other matters, the Bahawalpur state legislature has concurrent legislative power. Finally, there is a class of matters with respect to which the Bahawalpur state legislature has exclusive power. Executive authority is similarly divided. The federal court has jurisdiction in Bahawalpur. Under the Pakistan Citizenship Act, 1951, the subjects of the Ameer have, in general, become citizens of Pakistan, while remaining subjects of the Ruler; they are, therefore, now British subjects or Commonwealth citizens, under Section 1 of the British Nationality Act, 1948. The letter concluded by saying:

> 'The government of Pakistan have informed the Secretary of State that the State of Bahawalpur did not, on accession to the Federation of Pakistan, become a part of His Majesty's dominions, and that the view of the government of Pakistan is that the Ameer has continued to be a sovereign ruler and is entitled to immunity before the courts both within and outside Pakistan in civil cases. In these circumstances I am to say that the State of Bahawalpur is not a part of His Majesty's dominions, and that the Ameer, within the limitations imposed upon him by the constitutional arrangements set out above, is sovereign ruler of the State.'

The first point which the learned Judge had to decide was whether the defendant's application must be determined on the state of fact existing at the time of the service of the writ (24 May 1950) or on the state of fact existing at the date when the court was

called on to make its decision (11 January 1952). The difference in the state of fact was due to the fourth instrument of accession executed by the Ameer on 29 April 1951. The learned Judge decided in favour of the later date 'since it is to-day that I have to decide whether or not the defendant is entitled to the immunity claimed'. He went on to hold that, having regard to *The Fagernes*,[1] a statement made on behalf of the Crown that a particular area is not within His Majesty's dominions is conclusive on the point; also that, in view of *Duff Development Co.* v. *Kelantan Government*[2] and *The Arantzazu Mendi*,[3] a statement made on behalf of the Crown that a particular person is a sovereign of a particular state is equally conclusive. Therefore, the letter from the Commonwealth Relations Office, which stated that the State of Bahawalpur was not a part of His Majesty's dominions and that the Ameer within certain limitations was the sovereign ruler of that state, really settled the matter. The only question which remained was the extent of the limitations on the Ameer's sovereignty. As had been pointed out by Lord Finlay in the *Duff Development Co.* case, it was consistent with sovereignty that the sovereign may in certain respects be dependent on another Power. But the extent to which a sovereign may be limited in the exercise of his sovereign powers and yet remain entitled to the jurisdictional immunities that are the traditional attribute of sovereignty remains a difficult problem, to which neither that case, nor the present one, have provided a solution. After stating that it was not proper for the court, as a result of examining the limitations placed upon the ruler's sovereignty, to question the fact that the defendant was a sovereign ruler, Mr. Justice McNair proceeded to examine these very limitations and to hold that they had 'no application over a very substantial sphere'. He refused, however, to entertain a suggestion from the plaintiff appellant that the matter be referred back to the Commonwealth Relations Office for further information on the question whether or not the ruler was himself a British subject as the result of the Pakistan Citizenship Act, 1951, and the British Nationality Act, 1948. The argument was as follows: Section 3 of the former Act provides that 'At the commencement of this Act [viz., 13 April 1951] every person shall be deemed to be a citizen of Pakistan who or any of whose parents or grandparents was born in the territory now included in Pakistan and who after August 14, 1947, has not been permanently resident in any country outside Pakistan . . .'. For the purposes of this Act, 'territory now included in Pakistan' includes Bahawalpur. Correspondingly, the British Nationality Act, 1948, provides that anyone who is a citizen of Pakistan 'shall by virtue of that citizenship have the status of a British subject'. Prima facie, therefore, if the Ameer (or any of his parents or grandparents) was born in the 'territory now included in Pakistan', he was a British subject. But the learned Judge refused to believe that this point had not been considered by the Commonwealth Relations Office and he did not 'regard it as any part of the court's function to cross-examine the executive in matters of this nature'. Further, it was not necessarily inconsistent with the sovereign status of the Ameer that he should also have the status of a British subject under the Act of 1948. Finally, the statement in the letter that the Ameer was sovereign ruler of the State of Bahawalpur precluded the learned Judge from considering the question of the status of the component parts of the Federation of Pakistan or the question how far the recognition accorded to the Ameer in this case was consistent with the recognition of the Federation of Pakistan as an 'independent sovereign state' in *Kahan* v. *Federation of Pakistan*.[4]

It is clear from this decision, which was subsequently upheld by the Court of Appeal (Somervell, Jenkins, and Morris L.JJ.),[5] that the position of princes of the Indian peninsula in regard to immunities, which has more than once occasioned difficulties before the courts, has been made more anomalous than ever as a result of the recent constitutional changes. These princes may be British subjects and yet also sovereign rulers. They are

[1] [1927] P. 311; this *Year Book*, 9 (1928), p. 174.
[2] [1924] A.C. 797; this *Year Book*, 7 (1926), p. 218.
[3] [1939] A.C. 256; this *Year Book*, 20 (1939), p. 150.
[4] [1951] 2 K.B. 1003; this *Year Book*, 28 (1951), p. 394.
[5] [1952] 2 All E.R. 64.

sovereign rulers and yet, over wide fields, they have no legislative or executive powers. Their territories may be part of the 'Dominion of Pakistan . . . a self-governing country within the British Commonwealth of Nations' (*vide* the letter from the Commonwealth Relations Office referred to in *Kahan* v. *Federation of Pakistan*) and yet they are not 'part of Her Majesty's dominions'. The courts have pointed out the existence of these anomalies but have adopted the attitude that it is not their business to remove them. In a particular case, whether or not a ruler is entitled to immunities depends very largely on the phraseology of the letter from the Commonwealth Relations Office. In certain matters the courts consider themselves bound by statements contained in such letters; in other matters the courts still apparently consider themselves entitled to investigate, but they appear to show a reluctance to avail themselves of this right.

State Immunity—Waiver of Immunity—Limitations upon Immunity

Case No. 2. *Sultan of Johore* v. *Abubakar, Tunku Aris Bendahara and Others*, [1952] 1 All E.R. 1261. This case was an appeal to the Judicial Committee of the Privy Council from a decision of the Court of Appeal of the Colony of Singapore dated 1 November 1949. The litigation arose out of a dispute between the Sultan of Johore and his son, the first respondent, as to which of them was entitled to receive the rents and profits of certain lands in Singapore. In 1945, during the Japanese occupation, proceedings were instituted by means of an originating summons by the Sultan and on 18 June 1945 a Japanese-appointed judge gave judgment in the Sultan's favour. This judge belonged to the 'Syonan Kotohoin', a High Court which exercised a jurisdiction generally corresponding with that belonging to the former Supreme Court of the Straits Settlements—i.e. over Singapore, Penang, and Malacca. On 1 April 1946, after the return of the British, a new and separate Colony of Singapore was created by the Singapore Colony Order in Council, 1946.[1] Article 14 of this Order in Council established the Supreme Court of the Colony of Singapore. Under the Japanese Judgments and Civil Proceedings Ordinance, 1946,[2] it was provided that proceedings instituted in the Japanese-controlled court should be carried on in the new court. On the basis of this Ordinance, the first respondent, and other respondents, took out an originating summons in the High Court of the Colony of Singapore, claiming that they were persons aggrieved by the decree of 18 June 1945 and applying to have this decree set aside or alternatively for leave to appeal against the decree. The Sultan's solicitors entered a conditional appearance on his behalf and later took out a summons before a judge in chambers applying that the originating summons might be set aside and the proceedings stayed on the ground that the Sultan was a sovereign ruler. On 7 April 1949 Gordon Smith J. dismissed the application on the ground that, although the Sultan was a sovereign ruler, he had waived his immunity by issuing the originating summons in the 'Syonan Kotohoin'. The learned Judge further held that the proceedings now sought to be stayed were not new proceedings but were a continuation of the old proceedings. The Sultan appealed to the Court of Appeal of the Colony of Singapore, but his appeal was dismissed. Murray-Aynsley C.J. held that the Sultan's claim to be a sovereign ruler had not been established but that, if it were established, there had been no waiver of immunity. Sir H. C. Willan C.J., on the other hand, held that the Sultan was a sovereign ruler, but that he had waived his immunity. Evans J. held that, whatever the position as regards the Sultan's status and the alleged waiver of immunity, the Court had jurisdiction because the matter to be determined was 'one concerning land, which is undoubtedly within the jurisdiction and which is the subject of a private and personal claim of the Sultan, and not a claim of public property of the State'.

It was held by the Judicial Committee of the Privy Council:

(i) That, in view of a letter addressed by the Secretary of State for the Colonies to the rulers of the Malay States on 1 February 1951, in which it was stated that 'His Majesty's government regard Your Highnesses as independent sovereigns in so far as your relations

[1] S.R. & O., 1946, No. 464.

[2] Singapore Ordinance No. 37 of 1946.

with His Majesty are concerned', there could now be no doubt that the Sultan of Johore was a sovereign ruler. As this letter was in such categorical terms, it was not necessary to decide a point which the leading case of *Duff Development Co. Ltd.* v. *Kelantan Government*[1] left in doubt, namely, the point whether the status enjoyed by a foreign sovereign in a British court can be established, in case of doubt, only by a certificate issued by the appropriate Secretary of State on behalf of the Crown, or whether a court might be entitled, if the Crown failed to answer the inquiry in conclusive terms, to accept and act on 'secondary information' of another kind.

(ii) That there had been a waiver of immunity, because the steps taken by the respondents with a view to reversing the decision of the 'Syonan Kotohoin' were in the nature of an appeal from that court to a court having jurisdiction to reverse the decisions of the 'Syonan Kotohoin'. They were, therefore, a continuation of the proceedings which the appellant had himself started. No doubt it was anomalous for a tribunal set up by one authority to operate as a court of appeal from the decisions of a tribunal set up by a different and previous authority, but that is exactly what the Japanese Judgments and Civil Proceedings Ordinance, 1946, provided. It so provided for the very good reason that the proper law applicable was not affected by the military occupation.

For these reasons the Sultan's appeal was dismissed. The Board went on, however, to observe that there had not been established in England any absolute rule that a foreign independent sovereign cannot be impleaded in the English courts in any circumstances, and that 'it seems desirable to say this much having regard to inferences that might be drawn from some parts of the Court of Appeal's judgment in *The Parlement Belge*[2] and from the speech of Lord Atkin in *Compañía Naviera Vascongado* v. *Cristina S.S.*'.[3] The Board pointed out that, in *Larivière* v. *Morgan*,[4] a foreign sovereign was impleaded and that, if a foreign sovereign could never be impleaded without his consent, 'there could have been no justification for reserving the case of a sovereign's ship engaged in ordinary commerce—a reservation that was, in fact, made by the majority of the House of Lords in the *Cristina* case'.

It is difficult to assess the significance of these *obiter dicta* of the Board. All that can be stated beyond doubt is that, where the Secretary of State's letter expresses a foreign ruler's sovereign status in sufficiently clear terms, proceedings *in personam* against him will invariably be stayed; where the proceedings are *in rem* against a ruler's ship which is engaged in commerce or concern the title to immovable property within the jurisdiction, the matter is not settled; and that, where the Secretary of State's letter is not categorical as to the ruler's status, the court probably retains, though it may be reluctant to exercise, the right to conduct an independent examination. (See *Sayce* v. *Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State*, Case No. 1 above.)

State Immunity—Whether Limited to Actual Possession

Case No. 3. *United States of America* v. *Dollfus Mieg et Compagnie S.A.*, [1952] 1 All E.R. 572. These proceedings originated out of the case of *Dollfus Mieg et Compagnie S.A.* v. *Bank of England*, which has already been reviewed in this *Year Book*.[5] It will be recalled that in 1944 the Germans looted sixty-four bars of gold from a French bank (the *Crédit Commercial de France* at Limoges), which was holding them for Dollfus Mieg et Cie. The gold bars were later recovered by the United States forces and deposited in the Bank of England. In an action against the Bank of England, Dollfus Mieg et Cie claimed delivery of the bars or damages for their conversion. On 6 April 1949 Jenkins J. granted an application by the Bank to have the writ set aside on the ground that the sixty-four bars were in the possession or under the control of the Governments of the United Kingdom, the United States, and France (who had joined together in setting up the Tripartite

[1] [1924] A.C. 797; this *Year Book*, 7 (1926), p. 218.
[2] (1880), 5. P.D. 197.
[3] [1938] A.C. 485; this *Year Book*, 19 (1938), p. 243.
[4] (1872), L.R. 7 Ch. App. 550.
[5] See this *Year Book*, 26 (1949), p. 464, and ibid. 27 (1950), p. 460.

Commission for the Restitution of Monetary Gold to deal on their behalf with gold taken from Germany) and that the action impleaded two foreign sovereign states, namely, the United States and France, who declined to submit to the jurisdiction.[1]

On appeal it was held by the Court of Appeal on 6 March 1950 that the action instituted by Dollfus Mieg et Cie should be allowed to proceed because, by then, it had come to light that the Bank had failed to segregate the sixty-four bars, which consequently were not, at the relevant date, in the possession of or under the control of the three Governments, and that thirteen of the bars had even been sold. The Court of Appeal proceeded to give their views on the main points of the case, as the matter was one of public importance and not all the facts on which they based their conclusions had been before the court of first instance. They held (Sir Raymond Evershed M.R. dissenting) that, on the assumption that, under the contract between the Bank of England and the Tripartite Commission, the gold bars were returnable *in specie* by the Bank to the three Governments on demand, the bars had not ceased to be under the control or in the possession of the three Governments when they were deposited with the Bank.[2] The Master of the Rolls, on the other hand, considered that, after the bars were deposited with the Bank, they were no longer under the control or in the possession of the three Governments.

The Governments of the United States and France then presented a petition to the House of Lords for leave to appeal against the order of the Court of Appeal, even though they were not parties to the action. Alternatively, they asked to be joined as defendants to the action with leave to appeal against the order. The petition was heard by the Appeal Committee of the House of Lords on 8 May 1950, and it was ordered to stand over generally with liberty to any party to apply to restore it, but on the footing that, if the two Governments should within fourteen days apply to be joined as defendants to the action, the petition should not be restored until such action had been finally disposed of. By an order of Wynn-Parry J. on 20 July 1950[3] the two Governments were added as defendants to the action. On 27 October 1950 they applied for a stay of all further proceedings in the action, or, alternatively, of all such proceedings as related to the fifty-one gold bars still with the Bank of England. On 3 November 1950 this motion was dismissed by Romer J., on the authority of the judgment of the Court of Appeal dated 6 March 1950. On an appeal by the two Governments against Romer J.'s decision, the Court of Appeal considered certain additional evidence contained in affidavits filed by officials of the Bank, but held that this evidence did not affect the *ratio decidendi* of their decision of 6 March 1950 and dismissed the appeal. Leave was given to appeal to the House of Lords.

It was held by the House of Lords that the action must be stayed as to the fifty-one bars, but allowed to proceed in respect of the thirteen. The relationship between the Bank of England and the three Governments was that of bailee and bailors, and the Bank was under an obligation to keep the sixty-four bars separate from the general pool of customers' gold. The Governments, being bailors, had under English law the right to immediate possession and therefore could exercise the possessory remedies available to the possessor. The failure of the Bank to segregate the bars in no way destroyed the conditions on which it was instructed to hold them. Admittedly, the thirteen bars which had been sold were no longer in the possession of the Governments through their bailee, the Bank, but the fifty-one remaining bars were still in their possession. Since these bars were in the possession of foreign Governments and an attempt was being made to interfere with that possession, the two principles laid down by Lord Atkin in *Compañía Naviera Vascongado* v. *Cristina S.S.*[4] applied. These are that 'the courts of a country will not implead a foreign sovereign' and that 'they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control'. Viscount Jowitt, Lord Porter, and Lord Tucker all expressed a desire not to extend the doctrine of immunity beyond the limits already recognized, but it had to be remembered, as Lord Porter said, that 'governments must

[1] [1949] 1 All E.R. 946. [2] [1950] 1 All E.R. 747. [3] [1950] 2 All E.R. 605.
[4] [1938] A.C. 485 at p. 490; this *Year Book*, 19 (1938), p. 243.

act through servants or agents and often through bailees, and it would destroy the efficacy of the doctrine if it were strictly confined to personal possession'. The English courts, therefore, had no jurisdiction to order the Bank of England to deliver to Dollfus Mieg et Cie the fifty-one bars which still remained in the Bank. Nor could the company proceed with their action against the Bank for conversion of the sixty-four bars as a whole, since, if damages were awarded against the Bank, the latter would on payment acquire the company's title to the bars. The Bank could then set up this title against that of the Governments. This would amount to an interference with the right of the Governments to immediate possession of the bars since, if they wished to recover them, they would be obliged to submit to the jurisdiction of the courts as plaintiffs in an action. Moreover, if the Court had no power to order the Bank to deliver the bars to the company, it could not order the Bank to pay damages for failing to deliver them. The company might proceed, however, with their claim for damages for conversion of the thirteen bars which had been sold, as the Bank itself, by selling these bars, had to that extent, as Lord Tucker said, 'put an end to the bailment which alone afforded the protective umbrella of immunity'.

As was stated in the review of earlier proceedings in this case,[1] 'it is unfortunate that . . . the fundamental principle of the jurisdictional immunities of states became so involved with the niceties of the English law of bailment'. The same is true of the proceedings in the House of Lords where, however, Viscount Jowitt, referring to defects in the English law of possession and after having said: 'We are bound to decide this case in accordance with the English law', added: 'Yet it is germane to remember that the English law has incorporated the doctrine of State immunity from international law. It would be an unsatisfactory position if the extent and ambit of this doctrine were to depend on the special and peculiar doctrine of each jurisdiction in relation to "possession". . .' Coming from such a source, this is a highly important statement on the relationship between English law and international law. Although their Lordships showed no disposition to extend the doctrine of state immunity, they also let it be known that they regarded Lord Atkin's judgment in the *Cristina* case as sound in principle and that they did not sympathize with some of the suggestions put forward, *obiter*, by the members of the Court of Appeal, that the granting of jurisdictional immunities to foreign States should be restricted.

Jurisdiction—Foreign Confiscatory Decrees—Dissolution of Foreign Companies

Case No. 4. *Re Banque des Marchands de Moscou* (*Koupetschesky*), *Royal Exchange Assurance* v. *The Liquidator*; *Re Banque des Marchands de Moscou* (*Koupetschesky*), *Wilenkin* v. *The Liquidator*, [1952] 1 All E.R. 1269.[2] The Banque des Marchands de Moscou (Koupetschesky) had its head office in Moscow, a branch office in Petrograd, and no branch office in London. In December 1917 it was dissolved by a Soviet decree. On 30 May 1932 the English court made a winding-up order in respect of this bank and a liquidator was appointed. Assets worth a considerable amount came into the hands of the liquidator, and there were also a large number of claims against these assets. Among these were the claims of the Royal Exchange Assurance and Mr. Wilenkin.

The claims of the Royal Exchange Assurance were in respect of balance of deposit account, bonds, shares, securities, &c., together with interest. The liquidator's answer to these claims was that they related to a debt or a liability which was owing or accrued in Russia and that the position of the claimants was no different from that of any other creditor of the bank in Russia. According to English law a debt is situated where the debtor is, and so these debts were regulated by Russian law. Even if the Russian legislation, by reason of its confiscatory character, had no extra-territorial effect,[3] it was binding so far as debts in Russia were concerned.

[1] See this *Year Book*, 27 (1950), p. 461.

[2] Readers of this *Year Book* will be aware that cases relating to the affairs of Russian banks are no novelty in the English courts. See, for instance, this *Year Book*, 5 (1924), pp. 78 and 226; ibid. 7 (1926), p. 221; and ibid. 14 (1933), pp. 183–91.

[3] In view of the decision in *Bank voor Handel en Scheepvaart* v. *Slatford and Another*, [1951]

The claim of Mr. Wilenkin was in respect of services rendered to the bank. He argued that during 1930–2 he, as an expert in Russian law, rendered services to the bank in certain litigation in which it was then involved and before the winding-up order was made.

It was held, by Vaisey J.:

(i) *With regard to the claim by the Royal Exchange Assurance*, that this claim must fail. The debts owing to the claimants, being debts regarded by English law as locally situate not in England but in Russia, were extinguished by the Soviet decrees. For the effect of these decrees the learned Judge referred to familiar authorities, such as Scrutton L.J.'s judgment in *Luther* v. *Sagor*,[1] the Court of Appeal's decision in *Princess Paley Olga* v. *Weisz*,[2] Maugham J.'s decision in *Re Russian Bank for Foreign Trade*,[3] and finally Devlin J.'s decision in *Bank voor Handel en Scheepvaart* v. *Slatford and Another*.[4]

(ii) *With regard to the claim by Mr. Wilenkin*, that this claim must also fail. The basis of the claim was that valuable services had been rendered to the bank before the winding-up order was made. The question which had to be decided was, to what extent was the bank in existence in the period between its 'dissolution' by the Soviet decrees in 1917 and the making of the winding-up order by the English court in 1932. The question was primarily one of English law. The learned Judge admitted that a company may be 'hypothetically revived or reconstituted . . . for the limited purpose of enabling the winding-up order to be carried into effect', but held that this principle did not justify him in saying that the company existed for the purpose of employing agents for straightening out its affairs during the period when it was 'completely dead, subject only to such measure of revivification as must be deemed to have arisen through the making of the winding-up order'. Mr. Wilenkin's services had been useful, but they had been rendered to no one; he was an agent without a principal. The company was dissolved in 1917 and the liquidator had not yet been appointed. It could not be accepted that 'the non-existent company was none the less deemed to be employing a non-appointed agent to conduct its non-existent affairs'. Counsel for Mr. Wilenkin had invited the Court to consider, and if necessary to expand, the doctrine of 'agency of necessity', but Vaisey J. refused to apply the doctrine in this case. This doctrine, he said, should only be accepted with extreme caution, and probably not at all, unless a pre-existing agency could be established. If Mr. Wilenkin had already been the agent of the bank before its dissolution, then his claim might have had some basis; but, as it was, he was in the same unfortunate situation as the finder of a dog, in the eighteenth-century case of *Binstead* v. *Buck*,[5] who fed the dog for twenty weeks and who then unsuccessfully claimed the cost from the dog's owner when the latter appeared.

Jurisdiction—Foreign Armed Forces—Legal Position in the United Kingdom of Commonwealth Forces—Effect of Visiting Forces (British Commonwealth) Act, 1933

Case No. 5. *Reeves* v. *Deane-Freeman*, [1952] 2 All E.R. 506. On 14 November 1946 the plaintiff, while riding a motor-cycle, suffered personal injuries as the result of a collision with a lorry belonging to the Canadian Army and driven on military duty by the defendant, a member of the Canadian armed forces. On 2 December 1949 he issued a writ for damages for negligence against the defendant. The defendant pleaded that the action was time-barred by virtue of section 21 (1) of the Limitation Act, 1939, which requires that: 'No action shall be brought against any person for any act done in pursuance, or execution . . . of any public duty or authority . . . unless it is commenced before the expiration of one year from the date on which the cause of action occurred.' This point of law was ordered to be disposed of before the trial of the action. The plaintiff contended (i) that a soldier on duty was not entitled to the protection of section 21 (1), and (ii) that,

2 All E.R. 779, it may be doubted if the alleged confiscatory character of this type of legislation is the real reason why it does not have extra-territorial effect. See the commentary on this decision in this *Year Book*, 28 (1951), p. 397.

[1] [1921] 3 K.B. 532. [2] [1929] 1 K.B. 718; this *Year Book*, 11 (1930), p. 233.

[3] [1933] Ch. 745; this *Year Book*, 14 (1933), p. 190.

[4] [1951] 2 All E.R. 779; this *Year Book*, 28 (1951), p. 397. [5] 2 Black. W. 1117.

even if the Act afforded protection to a member of the British forces, it did not do so to a member of the Canadian forces.

It was held by Lord Goddard C.J. (i) that a British soldier on duty was entitled to the protection of section 21 (1) of the Limitation Act, 1939, and (ii) that, by virtue of section 2 (3) (*b*) of the Visiting Forces (British Commonwealth) Act, 1933, the object of which was, according to Lord Goddard, 'to put members of the forces of the British Commonwealth while in this country in precisely the same position as members of the home forces', the defendant was entitled to the same protection as a British soldier. It may be observed that this particular section of the 1933 Act is repealed under the Visiting Forces Act, 1952. Section 8 of the latter Act provides, however, that Her Majesty may by Order in Council confer on members of visiting forces privileges or immunities enjoyed by, or capable of being conferred on, members of the home forces. The 1952 Act applies automatically to Commonwealth forces and, so far as the forces of other (e.g. North Atlantic Treaty Organization) countries are concerned, to the forces of 'any country designated by Order in Council'. The Act, however, is not yet in force, it being provided that 'The Act shall come into operation on such date as Her Majesty may by Order in Council appoint', and no date having yet been appointed.

Recognition—Retroactive Effect of Recognition

Case No. 6. *Gdynia Ameryka Linie Żeglugowe Spółka Akcyjna* v. *Bogusławski and Another*, [1952] 2 All E.R. 470. This case concerned the retroactive effect of the recognition of foreign governments. The respondents were two seamen in a motor-vessel belonging to the appellant shipping company. They maintained that they were entitled to compensation from the company due to them under a decree issued by the Polish Government in London on 29 June 1945. The appellants denied liability on the ground that the recognition by the British Government of the new Polish Government in Poland, which took effect from midnight on the night of 5/6 July 1945, operated retroactively to 28 June 1945, on which day the Polish Provisional Government of National Unity was established in Poland, so that on 29 June 1945 they were no longer under the control of the Polish Government in London. Finnemore J. gave judgment for the seamen and ordered the company to pay the necessary compensation.[1] The Court of Appeal affirmed this order,[2] and the company appealed to the House of Lords. It was held by the House of Lords that the appeal should be dismissed. As, however, the appellants put forward a number of new arguments, it will be desirable to quote in full the terms of the Foreign Office certificate.[3] This reads as follows:

> '1. Up to and including midnight of July 5/6, 1945, His Majesty's government in the United Kingdom recognised the Polish government having its headquarters in London as being the government of Poland, and as from midnight of July 5/6, 1945, His Majesty's government in the United Kingdom recognised the Polish Provisional Government of National Unity as the government of Poland, and as from that date ceased to recognise the former Polish government having its headquarters in London as being the government of Poland.
>
> '2. On June 29 1945, the following message to the Prime Minister from the head of the said Polish Provisional Government of National Unity was handed by the Polish ambassador in Moscow to His Majesty's ambassador in Moscow: "I have the honour to notify you that as a result of the understanding reached in Moscow between representatives of Warsaw Provisional Government and Polish democratic leaders invited from Poland and from abroad under the auspices of the Commission of Three set up at the Crimea Conference, the Provisional Polish Government of National Unity was formed this June 28 according to art. 45 of the constitution of Polish Republic, 1921.

[1] [1950] 1 K.B. 157; this *Year Book*, 26 (1949), p. 468.
[2] [1950] 2 All E.R. 355; this *Year Book*, 27 (1950), p. 461.
[3] An extract only was cited in the report of the case in this *Year Book*, 27 (1950), at p. 462.

The Provisional Government of National Unity has realised in their entirety decisions of the Crimea Conference on the Polish question. At the same time I have the honour, in the name of the Provisional Government of National Unity, to approach His Majesty's government in the United Kingdom of Great Britain and Northern Ireland with a request for the establishment of diplomatic relations between our nations and for exchange of representatives with the rank of ambassadors."

'3. I am advised that the question of the retroactive effect of recognition of a government is a question of law for decision by the courts.'

It was argued by the appellants that paragraph 1 of the certificate (which gave the precise time of the change of recognition) referred only to the moment at which the British Government *recognized* one Polish Government and ceased to recognize the other; it said nothing as to when the new Polish Government's *authority* began. In so far as anything was said about the date when the new government's *authority* began, it was said in paragraph 2, and the relevant date was 28 June. Therefore, the appellants' argument continued, from that date all Polish nationals and property came under the new government's control, since there could not be two governments of a single state. Paragraphs 2 and 3 of the certificate must have been inserted for some purpose, and the only purpose must have been to qualify the meaning which might otherwise attach to paragraph 1. Finally, the appellants argued, in so far as the new government had undoubtedly obtained effective control over Gdynia (the official seat of the Polish merchant navy) it must be taken to have assumed control over the appellant company.

The House of Lords treated the case for the most part as one of construction of the Foreign Office certificate. It was agreed that the recognition of foreign governments may have a retroactive effect, Lord Oaksey in particular observing: 'It is true that the recognition de jure by the British government of a foreign government may in certain circumstances have a retroactive effect over a period before the recognition. In the absence of any intimation from the Foreign Secretary of the length of that period or the sphere in which the retroactive effect of the recognition is to operate, it may be necessary for British courts to go into the facts on these matters.' In this case, however, said Lord Morton of Henryton, the principle of retroactivity could not come into operation because the Foreign Secretary 'has been at pains to exclude it' by stating, in paragraph 1, in precise terms, the moment 'as from' which the new government became the recognized government of Poland and 'as from' which the old government ceased to be recognized. Lord Morton of Henryton observed of paragraph 2 that it contained 'merely a statement of fact' and did not comment on the new Government's message; and of paragraph 3 that it 'would appear to have been inserted, *ex abundanti cautela*, to remove any idea that the Foreign Secretary was purporting to decide a question of law'. There might be no good reason for the insertion of these paragraphs, but Lord Morton of Henryton considered that 'if the Foreign Secretary had intended to qualify in some way the statements made in para. 1, he would not have done it by this extremely round-about and obscure method'. Lord Reid was not so convinced that the certificate was lacking in ambiguity and preferred to approach the question on more general grounds. Paragraph 3, he thought, made it 'impossible to suppose that the Secretary of State intended to prevent any retrospective effect . . .'. But, whether or not the certificate put the respondents in a better position than if it had been in more general terms, it certainly did not put them in a worse position. In short, it was not intended to modify the general principle of the retroactivity of recognition. This principle 'enables and requires the courts of this country to regard as valid not only acts done by the new government after its recognition but also acts done by it before its recognition in so far as those acts related to matters under its control at the time when the acts were done. But there appears to be no English authority which goes beyond that. . . . I do not think it is inconsistent with this principle to say that the recognition of the new government has certain retroactive effects, but that the recognition of the old government remains effective down to the date when it was in fact withdrawn. I can see that there might be difficulties if the old government had purported before withdrawal of

recognition to take some action with regard to matters already under the control of the new government, but that does not arise in this case.'

It is submitted that there is a certain artificiality in attempts on the part of the courts to settle the question of the retroactive effect of recognition by reference to, and construction of, a Foreign Office certificate which itself states that this question is a question of law for decision by the courts, and that Lord Reid's judgment, which goes to the root of the matter, is to be preferred. Lord Reid's test is essentially that legal effect is to be given to acts done by the new government before its recognition 'in so far as those acts related to matters under its control at the time when the acts were done'. So far as the case before him was concerned, this settled the issue because the new government was not at the time in control of the company and had performed no acts towards it. For, as Lord Porter said, there was no substance in the argument that the new government might have taken some steps which it could enforce in Gdynia, and, in fact, it had taken no such steps.

Another conclusion which emerges is that any intention which the Foreign Secretary may have had of helping to avoid ambiguities, such as had arisen on past occasions, by drafting the certificate with more precision than was used in earlier certificates in like cases,[1] particularly as to the exact time of the granting and the withdrawing of recognition, was not fulfilled. Indeed, in so far as 'the question of the retroactive effect of recognition of a government is a question of law for decision by the courts' it is, *a fortiori*, one which cannot be resolved by a Foreign Office certificate. The remarks of Lord Oaksey quoted above may, however, be taken as an indication of the guidance which the courts expect to receive and which, if they receive it, enables them to solve without undue difficulty any problems that may arise. What is required of the Foreign Office certificate is that it should contain as much information as possible on the facts, particularly with regard to (i) the date of the formation of the new government; (ii) the date of its recognition by the British Government; (iii) the date of the British Government's withdrawal of recognition of the old government; and (iv) the extent of the persons and territory over which the new government exercised control at various times in the intervening period between its formation and its recognition by the British Government. The certificate should contain no express direction on the question of retroactivity and should be drafted in such a way as to avoid giving any impression that an implied direction is intended. There is, therefore, probably no advantage in including a paragraph to the effect that the matter of retroactivity is one for the courts, partly because it is redundant, partly because, in the very act of saying that the matter is one for the courts, it raises a possible implication that the recognition was perhaps intended to have a certain retroactive effect. Whereas, essentially, the question of retroactivity is not one of intention at all, but one of law and fact. In the event of a situation arising—as envisaged by Lord Reid—in which, at a given time before the change of recognition, both the old and the new government were purporting to take some action with regard to certain matters, the courts should be perfectly capable of settling the issue themselves by applying Lord Reid's own test and by asking themselves this question: at the given time were the relevant matters, in fact, under the control of the old government or of the new?

Recognition—Retroactive Effect of Recognition

Case No. 7. *Civil Air Transport Incorporated* v. *Central Air Transport Corporation*, [1952] 2 All E.R. 733. The Central Air Transport Corporation (subsequently referred to as C.A.T.C.) was an unincorporated body managing a commercial air transport enterprise under the direction of Ministers of the Nationalist Government of China. In 1949 the Nationalist Government was compelled by Communist forces to leave Nanking for the south of China and on 1 October 1949 the Communist Central People's Government of China (subsequently referred to as the Communist Government), which by this time had the greater part of China under its control, proclaimed itself to be the Government of China, dismissed Ministers of the Nationalist Government and appointed new ones.

[1] Cf. the certificate in *Luther* v. *Sagor*, [1921] 3 K.B. 532, at p. 536.

At this time forty aircraft belonging to C.A.T.C. were lying on an airfield in Hong Kong. On 4 November 1949 the Hong Kong authorities issued the Representation of Foreign Powers (Control) Ordinance, 1949, which provided that no person was to function on behalf of any foreign power (so defined as to include the government, whether legal or *de facto*, or any foreign state) without the consent of the Governor of Hong Kong. A few days later the president of C.A.T.C. transferred his allegiance from the Nationalist Government to the Communist Government, and the majority of C.A.T.C.'s employees in Hong Kong did likewise. On 12 November the acting premier of the Communist Government declared C.A.T.C. to be the property of the Communist Government and ordered the employees in Hong Kong to 'bear the responsibility of protecting the assets'. Thereupon the Nationalist Government suspended the registration certificates of all C.A.T.C.'s aircraft and appointed a new president of C.A.T.C. The latter suspended the defecting employees and took such steps as he could (including the posting of guards) to ensure that the aircraft were not removed. At the request of the police he removed the guards, and the defecting ex-employees took control of the aircraft. On 24 November, however, the Supreme Court of Hong Kong granted an interim injunction restraining these ex-employees from entering or remaining on C.A.T.C.'s premises or removing or tampering with C.A.T.C.'s property. This injunction was disregarded by the ex-employees and they in turn obtained an injunction restraining C.A.T.C. from removing the property on its premises. On 9 December the Nationalist Government moved its headquarters from the mainland of China to Formosa and on 12 December it accepted the offer of an American partnership to buy all the physical assets of C.A.T.C., one of the terms of the agreement being that the assets would not be used for transport to or from the Communist areas of China. On 19 December, in accordance with the terms of the agreement, these assets were transferred by the partnership to the appellant company.

On 6 January 1950 Mr. W. Graham, the British Consul-General in Peking, delivered the following Note to Mr. Chou En-lai, the Minister for Foreign Affairs of the Communist Government:

> 'I have the honour to inform Your Excellency that His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, having completed their study of the situation resulting from the formation of the Central People's Government of the People's Republic of China, and observing that it is now in effective control of by far the greater part of the territory of China, have this day recognized that Government as the *de jure* Government of China. In these circumstances His Majesty's Government, in response to Chairman Mao Tse-tung's proclamation of October 1, 1949, are ready to establish diplomatic relations on the basis of equality, mutual benefit and mutual respect for territory and sovereignty and are prepared to exchange diplomatic representatives with the Central People's Government.
>
> 'Pending the appointment of an ambassador, Mr. J. C. Hutchison has been nominated as His Majesty's Chargé d'Affaires *ad interim*. Accordingly I have the honour to request that you will receive him and transact official business with him in that capacity, and further that he may be granted all necessary facilities for the transfer of himself, his staff, and the archives of His Majesty's Embassy from Nanking to Peking.
>
> '(Signed) ERNEST BEVIN, His Britannic Majesty's Principal Secretary of State for Foreign Affairs.'

On the same day the Foreign Office stated that Mr. Graham had been instructed to inform Mr. Chou En-lai at the same time that, in consequence of their decision, the British Government had withdrawn recognition from the Nationalist Government, and that the Chinese Ambassador in London, Dr. Cheng Tien-hsi (i.e. the representative of the Nationalist Government) had already been informed of this decision by Mr. Hector McNeil, Minister of State.[1]

On 13 January 1950 the Communist Government instructed its general manager of

[1] See *The Times* newspaper, 7 January 1950.

C.A.T.C. to take over all C.A.T.C.'s assets in Hong Kong. On 19 May 1950 the appellants issued a writ in the Supreme Court of Hong Kong against C.A.T.C. claiming a declaration that the aircraft were their property. No appearance or notice to appear having been filed, the action might have proceeded no further since—in so far as C.A.T.C. might be held to be an organ of the Communist Government—it seemed to implead a foreign sovereign state, had it not been for the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950.[1] This Order, which was made on 10 May 1950, and came into operation forthwith, after reciting that the ownership of the aircraft was in dispute and that it was just and desirable that the question of their ownership and of the right to their possession should be decided by a court of law before they were allowed to leave Hong Kong, provided

(i) that in any action concerning the aircraft which might be instituted in the Supreme Court of Hong Kong, it should not be a bar to the jurisdiction of the Court that the action might implead a foreign sovereign state;
(ii) that, if no such action were instituted within twenty-one days, the Governor should himself refer the question to the Court for determination, and that, in these circumstances also, the Court should determine the question notwithstanding that the reference might implead a foreign sovereign state;
(iii) that if an action was instituted and the defendant failed to appear, or to put in a defence, the Court should, notwithstanding any rule enabling it to give judgment in default in such a case, inquire into the matter fully before giving judgment;
(iv) that there should be a right of appeal first to the Full Court of Hong Kong and then to the Privy Council;

[1] As explained in an Article by 'Aristeides' in *The International Law Quarterly*, 3 (1950), p. 159, the decision to issue this Order was a most unusual step. It was taken because His Majesty's Government appeared to be confronted by a conflict of international obligations. On the one hand—assuming that ownership of the aircraft lay with the appellants—there was His Majesty's Government's obligation to protect foreign property in its territory, and it might be argued that, if the authorities in Hong Kong allowed the aircraft to fly away, they would have failed to protect property which belonged to the appellants. On the other hand—assuming that ownership of the aircraft lay with C.A.T.C.—there was His Majesty's Government's obligation to recognize the immunity from the jurisdiction of foreign sovereigns and their property. There was also the point, arising under the Chicago Convention on International Civil Aviation of 1944 (Cmd. 6614), that, if the documents relating to the aircraft were not in compliance with the civil aviation regulations of Hong Kong, the Hong Kong authorities had the right and perhaps the duty to prevent them from leaving Hong Kong. There were in respect of the aircraft two sets of documents, one issued by the Nationalist Government and the other issued by the Communist Government. The question, therefore, which were the correct documents depended on the ownership of the aircraft, and this latter question could not be settled by the courts unless the difficulty raised by the immunity issue was removed. For, in an earlier action relating to the same aircraft (*Civil Air Transport Inc.* v. *Chennault and Others*, reported in *The International Law Quarterly*, July 1950, p. 184), it had been held by the original jurisdiction of the Supreme Court of Hong Kong (Gibson C.J.), on 23 February 1950, that the action must be dismissed because the aircraft were in the *de facto* control and possession of the Communist Government, which had been recognized *de jure* by the British Government, and that it was not necessary for the Communist Government (who were not parties to the suit) to appear before the court to claim sovereign immunity. For, basing himself on *Taylor* v. *Barclay* (1828), 2 Sim. 213, 220, where Shadwell V.C. said: 'I conceive it is the duty of the judge in every court to take notice of the public matters which affect the government of the country', Gibson C.J. declared: 'sovereign immunity does not seem to me to be a privilege which must be claimed before the courts will take notice of it, but rather a rule of law of which the courts must take notice if the appropriate facts come to its [*sic*] knowledge unless there has been submission to the jurisdiction.' Gibson C.J.'s judgment was subsequently upheld by the appellate jurisdiction of the Supreme Court of Hong Kong on 13 May 1950, i.e. three days after the making of the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950, and six days before the issue of the writ in the new action made possible by that Order in Council. The relevant portion of the text of the Order in Council is given in *The International Law Quarterly*, April 1951, pp. 176–7.

(v) that, until the Governor of Hong Kong was satisfied that ownership or right to possession of the aircraft had been finally determined, the aircraft should remain in Hong Kong and the Governor might give such directions as were necessary to prevent their removal; and

(vi) that the Governor should take such steps as might be necessary to give effect to the decision of the Court.

On 19 May 1950, shortly after the making of this Order in Council, the appellants (as we have seen) issued a writ against C.A.T.C. claiming a declaration that the aircraft were their property. The action was tried before Sir Gerald Howe C.J. sitting as the original jurisdiction of the Supreme Court of Hong Kong and, in a judgment delivered on 21 May 1951, he dismissed the claim. Appeal was made to the Full Court (Gould and Scholes JJ.), but, in a judgment delivered on 28 December 1951, this Court dismissed the appeal. A further appeal was then made to the Privy Council.

The Judicial Committee of the Privy Council advised that the appeal should be allowed. The opinion sets out a number of questions put by the Supreme Court of Hong Kong, and also one put by the Judicial Committee itself, to the Foreign Office, and the answers of the Foreign Office to these questions.[1]

These were as follows:

Questions put by the original jurisdiction

'1. Does His Majesty's government recognise the republican government of China (the nationalist government) as the de jure government of China? 2. If not, when did His Majesty's government cease so to recognise that government? 3. Is the Central People's Government or any other government recognised as the de jure government and, if so, from what date? 4. Has the republican government ceased to be the de facto government (either at the time of moving seat of government to Formosa or otherwise) and, if so, from what date? 5. Is any other government recognised as the de facto government and, if so, from what date? 6. What is the status of Formosa? Is Formosa part of China or is it foreign territory *vis-à-vis* China?'

Replies to above by the Foreign Office on 11 February 1950

'1. His Majesty's government in the United Kingdom do not recognise the nationalist government (republican government) as de jure government of the Republic of China. 2. Up to and including midnight of Jan. 5/6, 1950, His Majesty's government recognised the nationalist government as being the de jure government of the Republic of China and as from midnight January 5/6, 1950, His Majesty's government ceased to recognise the former nationalist government as being de jure government of the Republic of China. 3. As from midnight of Jan. 5/6, 1950, His Majesty's government recognised the Central People's Government as de jure government of the Republic of China. 4. His Majesty's government recognise that the nationalist government has ceased to be the de facto government of the Republic of China. It ceased to be the de facto government of different parts of the territory of the Republic of China as from the dates on which it ceased to be in effective control of those parts. 5. His Majesty's government do not recognise any government other than the Central People's Government of the People's Republic of China as the de facto government of the Republic of China. Attention, however, is invited to the second sentence of the answer to question 4. 6. In 1943 Formosa was part of the territory of the Japanese Empire and His Majesty's government consider that Formosa is still de jure part of that territory. On Dec. 1, 1943, at Cairo, President Roosevelt, Generalissimo Chiang Kai-shek and Prime Minister Churchill declared that all the territories that Japan had stolen from the Chinese including Formosa should be restored to the Republic of China. On July 26, 1945, at Potsdam, the heads of the governments of the United States of America, the United

[1] The questions put by the Supreme Court of Hong Kong were those put in connexion with the case of *Civil Air Transport Incorporated* v. *Chennault and Others*, referred to above, p. 466, n. 1.

Kingdom and the Republic of China reaffirmed: "The terms of the Cairo Declaration shall be carried out." On Oct. 25, 1945, as a result of an order issued on the basis of consultation and agreement between the Allied powers concerned, the Japanese forces in Formosa surrendered to Chiang Kai-shek. Thereupon, with the consent of the Allied powers, administration of Formosa was undertaken by the government of the Republic of China. At present, the actual administration of the island is by Wu Kou-Cheng, who has not, so far as His Majesty's government are aware, repudiated the superior authority of the nationalist government. I am advised that the effect of recognition by His Majesty's government as stated in answer to questions 1 to 5 and in particular its retroactive effect (if any) are questions for the court to decide in the light of those answers and of the evidence before it.'[1]

Further question put by the Full Court

'Does His Majesty's government recognise the People's Government as having become the de facto sovereign government or the government exercising effective control on Oct. 1, 1949, when it was proclaimed, or any other date between that date and Jan. 5, 1950, of the part of China of which the nationalist government had ceased to be the de facto government?'

Reply to above by the Foreign Office on 13 March 1950

'His Majesty's government in the United Kingdom recognise that in the period between Oct. 1, 1949, and Jan. 5/6, 1950, the Central People's Government was the de facto government of those parts of the territory of the Republic of China over which it had established effective control and if control was established after Oct. 1, 1949, as from dates when it so established control.'

Additional question put by the Judicial Committee of the Privy Council

'Referring to the above reply of the Foreign Office on Mar. 13, 1950, was there any declaration or other formal act by His Majesty's government in the United Kingdom on Oct. 1, 1949, or on any and what later date, recognising the Central People's Government as the de facto government, or is the reply to be understood as meaning that His Majesty's government in the United Kingdom, answering on Mar. 13, 1950, assert that their view was as stated in this answer but that there had been no declaration or other formal act of His Majesty's government on Oct. 1, 1949, or during the period mentioned which announced or implied de facto recognition?'

Reply to above by the Foreign Office on 28 July 1952

'The only communication relevant to this question made by His Majesty's government to the Central People's Government during the period Oct. 1, 1949, to Jan. 6, 1950, was the following note, which was delivered by His Majesty's Consul-General in Peking on Oct. 5, 1949. "His Majesty's government in the United Kingdom are carefully studying the situation resulting from the formation of the Central People's Government. Friendly and mutually advantageous relations, both commercial and political, have existed between Britain and China for many generations. It is hoped that these will continue in the future. His Majesty's government in the United Kingdom therefore suggest that, pending completion of their study of the situation, informal relations should be established between His Majesty's consular officers and the appropriate authorities in the territory under the control of the Central People's Government for the greater convenience of both governments and promotion of trade between the two countries." This communication was not intended at the time when it was made either to constitute or to convey de facto recognition. Nevertheless the answer made by the Foreign Office dated March 13, 1950, to the questions addressed to it by the Hong Kong courts and quoted in your letter is to be understood as meaning that His Majesty's

[1] It will be appreciated that reply No. 6 was given before the Treaty of Peace with Japan of September 1951, when Japan renounced any claim to Formosa.

government in the United Kingdom answering on that date asserted that their view was as stated in that answer.'

The appellants argued that on 12 December 1949 there was a valid sale of the assets of C.A.T.C. by the Nationalist Government to the partnership; that the Nationalist Government was empowered to effect this transaction, since it was still recognized by the British Government as the *de jure* government of China; that the doctrine of the retroactive effect of recognition did not apply; and finally that the partnership duly transferred the assets to the appellants. It had been held, however, by Sir Gerald Howe and by both judges of the Full Court that on 12 December 1949 the position of the Nationalist Government was such that it could not validly enter into such a sale, since it no longer exercised any effective control over the mainland of China and the aircraft in Hong Kong were in the possession and control of the Communist Government; and that, the Nationalist Government being 'fully alive to the probability of the withdrawal of recognition by His Majesty's government in the near future', the so-called sale was 'a device . . . by which it was hoped that the aircraft might be prevented from passing to the Central People's Government on its recognition *de jure* . . . a transaction . . . inimical to the interests of the Chinese people . . . an act of members of the nationalist government done, not in good faith as trustees, but for an alien and improper purpose'. Rejecting this view, the Judicial Committee advised that 'the validity of the transaction must be judged as at the date when it was entered into, and not in the light of subsequent events, which might have turned out differently'; that there was no proof that the Nationalist Government was aware that the British Government might withdraw recognition and, even if there were, that the question of the motive of the sale was irrelevant. 'A government's policy', said the Judicial Committee, 'in buying or selling chattels which it owns is not subject to the review of foreign tribunals and whether its action in this regard is against the interests of those whom it is supposed to serve is a political question. British courts cannot take it on themselves to pronounce whether a foreign government, recognised by Her Majesty's government, is acting contrary to the interests of its people, and a government is certainly not a trustee in these matters in any legal sense. The right in municipal law to follow property which is subject to a trust into the hands of third parties cannot have any application here.'

English courts are perhaps too prone to invoke the conception of the trust in contexts where it is not appropriate, so the above statement is to be welcomed as a valuable clarification of the law. It is, however, qualified by the observation that: 'At the same time, their Lordships must not be understood to reject the possibility of our courts refusing, in a conceivable case, to recognise the validity of the disposal of State property by a government on the eve of its fall, e.g., by a despot, who knows that previous recognition is just being withdrawn, where it is clear that his purpose was to abscond with the proceeds, or to make away with State assets for some private purpose.' While the insertion of this *obiter dictum* in the opinion may have been a wise precaution, it must be admitted that the basis of the distinction is not clear, unless it is that some distinction should be drawn between the acts of a government *qua* government, and the acts of a dictator done for motives of personal gain. If that is so, and if a further distinction is to be drawn between despots and non-despots, the courts will very soon find themselves involved in the 'political questions' which they are rightly so anxious to avoid.

It had also been held by the Hong Kong courts (Gould J. dissenting) that the sale of 12 December 1949 was invalidated by the subsequent recognition *de jure* of the Communist Government. On this question the Judicial Committee observed that: 'Primarily, at any rate, retroactivity of recognition operates to validate acts of a de facto government which has subsequently become the new de jure government, and not to invalidate acts of the previous de jure government', and then (employing a caution similar to that of Lord Reid in the House of Lords in *Gdynia Ameryka Linie Żeglugowe Spółka Akcyjna* v. *Bogusławski and Another*[1]), 'it is not necessary to discuss ultimate results in the hypothetical case when, before the change in recognition, both governments purport to deal

[1] [1952] 2 All E.R. 470; see above, pp. 462–4.

with the same goods'. A short answer to the question of retroactivity in this case might have been to hold that, since the aircraft were not on Chinese territory, the recognition of the Communist Government on the night of 5/6 January 1950 could not have invalidated any title to the aircraft which the Nationalist Government might have had on 12 December 1949, when it was still recognized *de jure*. The Judicial Committee was not prepared to go so far as to hold this, but it pointed out that, whatever the degree of control exercised over the aircraft in Hong Kong by the defecting ex-employees, this control was in defiance of the injunction granted by the Supreme Court of Hong Kong on 24 November 1949 and—since the Governor had not given his consent—of the Representation of Foreign Powers (Control) Ordinance, 1949, issued in November 1949, and would consequently be a criminal offence under the law of Hong Kong. In such circumstances the question arose of what meaning should be attributed to Lord Wright's dictum in *Compania Naviera Vascongado* v. *Cristina S.S.*[1] that it was 'unnecessary to consider by what mode the respondent obtained possession. It is enough to ascertain that it [the Spanish Republican Government] had possession at the time when the claim to immunity was made'. It had, however, been pointed out by Gould J. in the Full Court of Hong Kong that Lord Wright's proposition was in relation to a claim of sovereign immunity, but that this was not the issue in the present case, in which the court was required to make a declaration of legal rights. The present question must be settled with reference to the right to possession and the Communist Government was unable to show any superior title or right to possession. 'Nor', continued Gould J., 'can it rely upon any rights arising out of actual possession acquired in the way it was; therefore, it had no possession which could bring into effect the doctrine of retroactivity. That doctrine . . . relates to the acts of a government which has already acquired jurisdiction through possession and cannot include the actual act of taking possession if that act be wrongful.' The Judicial Committee upheld this view.

Thus was settled a case of considerable political importance and some legal complexity,[2] although the issue which finally came before the Judicial Committee of the Privy Council was comparatively simple. The Judicial Committee has, however, given certain clarifications concerning the bounds within which the principle of retroactivity of recognition should operate. It is now clear, for instance, that, when a transaction has been effected by a government which has subsequently ceased to be recognized, the transaction is not in principle invalidated by the subsequent change of recognition, although it is possible to imagine circumstances (e.g. fraud) in which it would be invalidated. It is also clear that the subsequent recognition of the new government does not render valid a previously acquired possession which was not lawful at the time it was acquired. Another feature of the case is that, unlike *Gdynia Ameryka Linie, &c.* v. *Bogusławski and Another*, the interpretation of the various Foreign Office certificates seems to have led to no difficulty, the replies to the questions put by the courts being in the form stated in the comment on the *Gdynia Ameryka Linie* case, *supra*, to be the form likely to be of most assistance to the courts. The replies of 11 February 1950 relating to the status of Formosa are interesting from the point of view of international relations generally,[3] although, as it turned out, they had no particular bearing on the advice rendered by the Judicial Committee of the Privy Council.

Extradition—Political Crimes

Case No. 8. *Re Government of India and Mubarak Ali Ahmed*, [1952] 1 All E.R. 1060. Mubarak Ali Ahmed, who claimed to be a native of Pakistan, was arrested in the Republic of India and there charged with forgery and fraud. He was committed for trial, but he defaulted on his bail and fled to Pakistan. Later, he came to England, where he was

[1] [1938] A.C. 485, at p. 506; this *Year Book*, 19 (1938), p. 243.

[2] See the article, already referred to, by 'Aristeides' in *The International Law Quarterly*, 3 (1950), p. 159.

[3] See the remarks of Mr. L. C. Green in *The International Law Quarterly*, July 1950, pp. 421–2.

arrested, and an order was made, under the Fugitive Offenders Act, 1881, by a metropolitan magistrate, sitting at Bow Street Magistrate's Court, for his detention pending his return to India to take his trial. In an application for a writ of *habeas corpus* and for the discharge of the detention order, it was urged on behalf of the applicant (i) that the Fugitive Offenders Act, 1881, was no longer of any effect as between India and England; (ii) that there was no substance in the charges made; (iii) that the proceedings were based on political considerations only; (iv) that, having been branded as a spy for Pakistan, he would not be given a fair trial in the presidency of Bombay where he was due to come up for trial; (v) that, if he returned to Bombay, he would not be able to defend himself properly by reason of his inability to call the necessary witnesses, who were in Pakistan and who would not go to India; and (vi) that he had no funds in India for his defence, all his property there having been confiscated. The application was made partly under Section 5 of the 1881 Act, which gives a person who has been ordered by a magistrate to be returned the right to apply for a writ of *habeas corpus*, and partly under Section 10 of the Act, which gives power to a superior court to discharge an offender where his return would be oppressive or unjust.

The case came before a Divisional Court of the Queen's Bench Division and the judgment was given by Lord Goddard C.J. who dealt first with the contention that the Fugitive Offenders Act no longer applies to India. This contention rested on the fact that Section 12 of the 1881 Act provides that the Act can be applied to any of 'Her Majesty's dominions' by an Order in Council, and that India, being now a republic, was no longer one of the countries to which the Act applies. Lord Goddard considered, however, that the 1881 Act remained applicable as between the United Kingdom and India because, in anticipation of India becoming a republic, the Imperial Parliament had passed the India (Consequential Provision) Act, 1949, which expressly provides that all Acts, enactments, &c., relating to India, which were already in existence, are to remain in force. As to the various other reasons for the application, Lord Goddard said that no case had been made out to justify the court exercising its power under Section 10 of the 1881 Act. In a proper case, the court would apply the same rules with regard to applications under this Section that it does under the equivalent Section 3 (1) of the Extradition Act, 1870. In this connexion Lord Goddard referred with approval to *Re Castioni*,[1] in which the Court refused extradition because the crime of the fugitive concerned (who had shot a member of the Government while taking part in a revolutionary movement in the Canton of Ticino) was considered to be political. The present case, however, concerned a man charged with forgery and, even if the case had some political implications—into which the Court could not inquire—there was no reason to suppose that he would not receive a fair trial and it would be an 'impossible position for this court to take up' and 'an insult to the courts of India' to say that he would not. The application was, therefore, refused.

It may be observed that, if the 1881 Act had been held inapplicable to India, the applicant would have had to be released because the position is not that the 1870 Act applies to all non-Commonwealth countries, but that it applies only to those countries with which an extradition treaty has been concluded, and there is naturally no extradition treaty between the United Kingdom and India. There is in the 1881 Act no provision equivalent to Section 3 of the 1870 Act, which provides specifically for the non-return of political offenders, but it seems that the courts would, if necessary, use section 10 of the 1881 Act, which is cast in general terms, for the same purpose.

Enemy Property—Status of the Custodian of Enemy Property

Case No. 9. *Bank voor Handel en Scheepvaart* v. *Slatford* (*sued as Custodian of Enemy Property*) *and Another*, [1952] 1 All E.R. 314. Mr. Justice Devlin's first decision in this case[2] was reported in the last volume of this *Year Book*.[3] It will be recalled that gold belonging to the plaintiff bank in London was vested in the Custodian of Enemy Property

[1] [1891] 1 Q.B. 149.

[2] [1951] 2 All E.R. 779.

[3] 28 (1951), p. 397.

by an order made by the Board of Trade under Section 7 (1) of the Trading with the Enemy Act, 1939, and that the Custodian sold this gold and later transferred the proceeds to the Administrator of Hungarian Property. The reason for this transfer was that the majority of the shares in the plaintiff bank were owned by a Hungarian national. The plaintiff bank, however, which was incorporated in the Netherlands, obtained judgment against the Administrator for the amount of the proceeds of the gold, together with interest at 4 per cent. The amount was not agreed. The plaintiffs claimed £2,224,367. 6*s*. 11*d*. but the Administrator contended that the sum should be £2,148,041. 8*s*., the difference of £76,325. 18*s*. 11*d*. being income tax paid by the Custodian in respect of profits made from the purchase by the Custodian of Treasury bills at a discount while the money was in his hands. The plaintiffs accordingly took out an application to determine whether the sum owing to them should be paid without deduction of income tax. They argued that income tax should not be deducted since the Custodian was a servant of the Crown and as such was exempt from income tax and should not have paid the tax.

It was held by Mr. Justice Devlin that the plaintiffs were entitled to the earnings of the proceeds resulting from the sale of the gold without deduction of income tax. It was not disputed that the Income Tax Acts do not bind the Crown. The decision, therefore, turned purely on the status of the Custodian and on the question whether, for the purpose of these Acts, he was or was not a servant of the Crown.

In *Austrian Property Administrator* v. *Russian Bank for Foreign Trade*,[1] it had been held that the Administrator was a 'Crown servant'. The defendants in the present case, however, argued that there were material differences between the status of an Administrator and that of the Custodian. The principal difference, it was alleged, was that the Custodian was not an officer of the Executive at all, but a creature of Parliament created by the Trading with the Enemy Acts, and therefore not a 'Crown servant'. Support for this contention was found in *Re Ferdinand* (*Ex-Tsar of Bulgaria*),[2] where it was held that the Trading with the Enemy Acts were so inconsistent with the exercise of the prerogative in regard to the forfeiture of enemy property that the prerogative power in this matter must be treated as temporarily suspended. Mr. Justice Devlin, however, considered that all that Parliament had done in passing these Acts was to define and modernize the prerogative power. He pointed out that, in *Re Ferdinand* itself, Warrington L.J. had referred to the Custodian without discrimination as an officer of the Crown and as an officer designated by the Act. True, there were some important differences between an Administrator and the Custodian, but Mr. Justice Devlin held that 'if the Custodian is an officer of the executive at all, I think he must have Crown status, for his duties[3] bring him within the sphere of two of the most ancient and peculiar prerogatives of the Crown—the power to make war, including the power to take for itself the property of an enemy found within the realm, and the power to make peace'. The learned Judge proceeded to consider some of the differences in the status of the two officers. Whereas an Administrator is appointed after the peace treaty has been concluded and is an agent who distributes enemy property on behalf of the Crown in accordance with treaty obligations, the Custodian is appointed on the outbreak of war and is a trustee. The Custodian is, moreover, a peculiar kind of trustee. He is a trustee without a beneficiary in that 'he holds the legal property only, and the beneficial interest is temporarily non-existent'. Further, 'the Custodian, in deciding under the general direction of the Board of Trade, what property he shall take and what release, is much more than a trustee; he is acting then as an instrument of war-making government'. He is not a corporation sole, but an individual with a very large income and 'under current rates of taxation there would not be enough of it left to be worth worrying about'. After considering these points, the learned Judge nevertheless declined to accept the plaintiffs' submission that the Custodian is a 'Crown servant' in the strict sense, but only because, in his view, the state of modern constitu-

[1] (1932), 48 T.L.R. 37. [2] [1921] 1 Ch. 107.

[3] Namely, the duties of 'preventing the payment of money to enemies' and 'preserving enemy property in contemplation of arrangements to be made at the conclusion of peace'.

tional law is such that 'there is not . . . any strict sense at all' and 'the submission confuses the inquiry'. It was sufficient, in order to establish exemption from the Income Tax Acts, that the Custodian should have 'Crown status' within the meaning of Scott L.J.'s judgment in *London County Territorial and Auxiliary Forces Association* v. *Nichols*,[1] where it was held that, even though it is sometimes difficult to lay down any exact criterion for determining Crown privilege, any 'direct emanation from the Crown' has 'Crown status'. The learned Judge held, accordingly, that the Custodian was, if not a 'Crown servant' in the strict sense, at least a person having 'Crown status', or, at the very least, a person receiving the income for a 'Crown purpose', and, as such, he was exempt from the payment of income tax on such income. Therefore, judgment was entered for the plaintiffs for the amount claimed by them, with interest thereon at 4 per cent. per annum.

The above decision was, however, reversed on appeal by the Court of Appeal (Sir Raymond Evershed M.R., Denning and Romer L.JJ.).[2] Sir Raymond Evershed examined closely the provisions of the Trading with the Enemy Act regulating the functions of the Custodian and held that, during the period of retention of the sums in question by the Custodian, the rights and interests of the plaintiff bank were not wholly extinguished, but were in 'statutory suspense'. It was, therefore, impossible to say that the money was held by the Custodian exclusively for 'public' purposes. The purposes for which the Custodian held it were distinct from the prerogative rights of making war or peace. The money may have come into the Custodian's hands as a result of 'war measures', but not all 'war measures' were manifestations of the war-making prerogative. *Austrian Property Administrator* v. *Russian Bank of Foreign Trade* was distinguishable on the ground that the Administrator in that case was appointed 'exclusively for the purpose of providing the mechanism for giving effect to the Treaty of Peace made by the Sovereign by virtue of his prerogative treaty-making power . . .'. As for the maxim that the Income Tax Acts do not bind the Crown, the Court of Appeal was unanimous in holding that this conceals the true principle which is that, in the absence of express provision to the contrary, the Crown and the rights of the Crown are not to be prejudiced. As Denning L.J. said, the Crown would not be prejudiced at all if the Custodian in this case were made liable to pay income tax; rather it would be seriously prejudiced if the Custodian did not pay the tax.

These two decisions, though not strictly on a point of international law, are nevertheless of considerable interest to international lawyers. The Custodian of Enemy Property continually figures in international law cases, and it is an advantage that his status, as well as that of an Administrator of Property under a peace treaty, has to this extent been clarified.

Prize Law—Enemy Character—Neutral Subjects in Enemy Country

Case No. 10. *The Inginer N. Vlassopol*, 1 Ll. P.C. (2nd) 307. In 1932 the claimant, Commander Vlassopol, born of Greek parents in Roumania, bought from a Cardiff shipping firm a vessel known as the *Loyal Devonian*, and registered her under the Roumanian flag as the *Inginer N. Vlassopol*. Not without difficulty, the claimant, who had pro-Allied sympathies, cleared the vessel from Braila in Roumania after the outbreak of war between the Allies and Germany in 1939 and ordered her to proceed to Avonmouth. The vessel then came under the management of the claimant's cousin, who was a shipbroker in London. The claimant tried hard to have the vessel transferred to another flag and even obtained a permit from the Roumanian Ministry of Marine consenting to such a transfer, but the Roumanian Legation in London proved obstructive. On 3 January 1941 the vessel was requisitioned by the British Ministry of Shipping under the Defence (General) Regulations Act, 1939. On 15 February 1941 Roumania was proclaimed by the Board of Trade as 'enemy territory' for the purposes of the Trading with the Enemy Act,[3] and also on that day the vessel was registered as a British ship, her name later being changed

[1] [1948] 2 All E.R. 432.
[2] [1952] 2 All E.R. 956.
[3] The Trading with the Enemy (Specified Areas) (No. 1) Order, 1941 (S.R. and O. 1941, No. 189).

to the *Hampton Lodge*. On 6 December 1941 Roumania declared war on the United Kingdom. Later that month the vessel was de-requisitioned and on 23 December she was seized in prize under the name of *Inginer N. Vlassopol*. On 10 July 1942 she was condemned by Lord Merriman, President of the Admiralty Division (in prize). His decision is not reported. On 17 February 1943, while being operated by the Crown, she was sunk. In November 1946, the claimant escaped from Roumania and arrived in England on a Greek passport. In 1947 he took various steps to assert his rights, such as submitting a petition for the bounty of the Crown, applying to the Custodian of Enemy Property for the recovery of money belonging to him in the United Kingdom, and applying to the Treasury for leave to put forward a claim for the hire in respect of requisition of his ship before her seizure in prize. The application to the Custodian of Enemy Property was successful, but the Assistant Procurator-General, dealing with the petition for bounty, rejected it on the grounds that the claimant had been a 'mobilized officer in the Roumanian Ministry of Marine' and had sworn false statutory declarations. The application to the Treasury was rejected for the reason that the time allowed for lodging such a claim had already expired. As a last resort, therefore, the claimant sought to have the President's condemnation of the vessel as prize in 1942 set aside.

Three grounds were put forward: first, that material facts relating to the ship's ownership and status were not available at the time of the previous hearing: secondly, that although the Ministry of Shipping purported to have requisitioned the ship from January 1941 until December 1941, the conduct of the Crown at that time involved actual acquisition of the ship by the Crown; thirdly, that the seizure in prize of a neutral ship which had voluntarily come into a British port by the action of the owner, who was at all times a citizen of an Allied country, and her purported release from requisition in order to be seized in prize, was contrary to the principles of law and equity.

The matter came before the President again with rather fuller evidence than on the previous occasion. It became apparent, for instance, that unsuccessful attempts had been made to enter an appearance on behalf of the claimant and that in 1942 the Swedish Legation in London (which was protecting Roumanian interests) had written to the Foreign Office. In its letter the Swedish Legation had stated that, as the *Inginer N. Vlassopol* had been 'requisitioned' before being 'captured', the owner was entitled either to compensation for the use of the ship or to her return after use, and that the arbitrary replacement of requisition by capture with the purpose of releasing the British authorities from the obligations initially incurred by them constituted an abuse and a violation of the principles of international law. The President, who expressed strong criticism of the officials responsible for withholding this information from him at the time and who implied that, if he had known of it, he might have adjourned the case, nevertheless pointed out that the burden was still on the claimant to make good his case and to displace the *prima facie* presumption in favour of condemnation which arose from the Roumanian registry of the ship.

The President found on the evidence that the claimant was a Greek citizen, that he was not and never had been a Roumanian citizen, that he was not an officer in the Roumanian Ministry of Marine and that he had done everything it was possible for him to do to divest himself of a Roumanian connexion, save only that he was personally present in Roumania, and that it was not possible for him to obtain an exit permit from that country. The President further found that the claimant's vessel had been taken off the British Register 'for the sole purpose of seizing her as a Roumanian ship'. He in no way wished to minimize the importance which, speaking generally, is attached to the flying of the enemy flag, and in this connexion he referred to the case of the *Unitas*.[1] But, even in that case, the Judicial Committee of the Privy Council recognized that there may be exceptions to the rule that the flying of the enemy flag is sufficient to establish the enemy character of the vessel. In the present case the slightest inquiry would have brought to light the claimant's Greek nationality, and his anxiety to help the Allies by transferring

[1] [1950] A.C. 536; 1 Ll. P.C. (2nd) 277; this *Year Book*, 27 (1950), p. 465.

his ship. Admittedly residence by a neutral in an enemy country at the outbreak of war—war between the United Kingdom and Roumania broke out seven months before the condemnation of the vessel as prize—raises a presumption that the neutral is there *animo manendi*, which it lies on him to explain (*per* Sir William Scott in *The Bernon*[1]). But the question whether the neutral has a commercial domicil in an enemy country is essentially one of fact and depends upon the evidence as to the acts and intention of the neutral (*per* Lord Sumner in *The Kara Deniz*[2]). The true principle was that laid down by Lord Parker (speaking for the Judicial Committee of the Privy Council) in *The Anglo-Mexican*,[3] namely, that a neutral, having a commercial domicil in a country which becomes an enemy country on the outbreak of hostilities, 'ought . . . to be allowed a reasonable interval during which he may discontinue or dissociate himself from the business in question. If he has done this prior to the capture at sea of any goods belonging to his business, such goods or his interest in them will not be confiscable.' The claimant in the present case, by sending his ship away and by obtaining permission to change her registry even before the outbreak of war, had satisfied this test. Thus, although the claimant had a commercial domicil in an enemy country, the vessel was not properly condemned as prize. Accordingly, the decree of condemnation was set aside, the Procurator-General being required to bring into Court a sum which, if not agreed, was to be determined, and being required also to release that sum to the claimant. In view of the conduct of the Crown's officials, costs were awarded against the Crown. Damages were also awarded in respect of the hire between 23 December 1941 and the date of the loss.

Prize law has become so strict and unrelenting that it is welcome to find the Prize Court not merely asserting its independence of the Executive but even criticizing the conduct of the Executive. From the legal point of view the interest of the case lies in the reaffirmation by the President of the rule applied by the Judicial Committee of the Privy Council in *The Anglo-Mexican* case.[4]

Prize Law—Bringing of Vessels into Port—Evidence

Case No. 11. *The Patrai*, 1 Ll. P.C. (2nd) 339. In October 1939, a month after the outbreak of war, the *Patrai*, a Greek steamer, was on a voyage from the Levant and the Portuguese coast to Antwerp and Rotterdam with a general cargo. On 26 October the London agents of Hellenic Lines, Limited, owners of the *Patrai*, sent details of the cargo (which included emery stone) to the Ministry of Economic Warfare. On 1 November the *Patrai* called at Weymouth for examination by the Naval Contraband Control Service. Further documents required by the Ministry were supplied by 6 November, but it was not until 23 November that the *Patrai* and her cargo were released. The plaintiffs, the owners of the vessel, sued the Crown in the Admiralty Division for damages for undue and unreasonable detention of the vessel and her cargo. They argued, first, that there was no reasonable ground of suspicion justifying detention of the ship at all; secondly, that, even if there were such ground, the Crown was unreasonably slow with its inquiries.

It was held by Lord Merriman (President of the Admiralty Division) that the claim must be dismissed. Emery stone was absolute contraband within Schedule I of the Proclamation of 4 September 1939, and there was evidence not only that Germany urgently required this material, but also that the consignment in the *Patrai*, together with a consignment in another vessel bound for Holland at the same time, represented more than half the total imports of emery stone into Holland in 1938 and three-quarters of the normal annual imports into Holland from Greece. Lord Merriman next considered the organization set up by the Crown to deal with contraband traffic. He found that this organization was, at the outbreak of war, naturally in an experimental stage and that cases took longer to decide than they did later on. This, however, was not unreasonable

[1] (1798), 1 C. Rob. 101, at p. 104. [2] 10 Ll. P.C. 355.

[3] [1918] A.C. 422, 5 Ll. P.C. 109.

[4] For an article on this subject, including an analysis of the *Anglo-Mexican* case, readers are referred to Lewis, 'Domicile as a test of enemy character', in this *Year Book*, 4 (1923–4), p. 60.

in the circumstances, and the delay to which the *Patrai* had been subjected was almost entirely due to suspicions about the ultimate destination of the emery stone. The Crown had received from secret sources reports which justified these suspicions. Lord Merriman ruled that, not only was the Crown not obliged to disclose the source of this information, but also that the nature of the allegations need not be specified—in case this should lead to a disclosure of the source. In any case, there was evidence that the plaintiffs themselves knew that there was something suspicious about the emery stone since, on 13 November, their London agents had written a letter stating: 'We shall . . . recommend our principals in Piraeus to avoid shipments of this character in the future.' Eventually, on 23 November, the vessel and cargo were released, an arrangement having been worked out whereby the cargo was to be kept at Rotterdam at the disposal of the Ministry of Economic Warfare or of the British Consul at Rotterdam pending final determination.

Lord Merriman considered that the action taken by the Ministry of Economic Warfare was in accordance with the authorities. It had been held in *The Zamora* (No. 1)[1] that the practice of bringing vessels into harbour for the purpose of visit and search was justifiable, because search at sea is impossible under the conditions of modern warfare. Lord Merriman added the important comment that 'just as it was there held that from the point of view of international law it would be a mistake if this practice were allowed to give rise to rights which could not arise if the search took place at sea, equally it would . . . be a mistake if it were allowed to deprive the Crown of existing rights, or expose it to new liabilities'. It had also been held in *The Falk*[2] that, where there is a probable cause for seizure, the Procurator-General is not to be held liable for bringing the case to adjudication, though unsuccessfully, and, moreover, that the test of 'probable cause' or reasonable grounds for suspicion is not confined to what was known at the time of the detention, still less to what was then actually known to the individual officers concerned, but depends on what is known by the officers of the Crown generally. Admittedly, it had been held in *The Falk* that arbitrary or capricious arrest ventured on the hazard that a case for conviction may turn up, may involve liability for damages, but Lord Merriman's comment on this was that 'if it is blameworthy to venture on a capricious arrest on the chance that something may turn up, it follows that those with whom rests the decision, on behalf of the Crown, whether to seize or not, must be allowed reasonable time to consider the information on which this decision is to be based'. Lord Merriman further held that, even if all formalities (e.g. documents) required by the Crown are complied with, the Crown is not precluded from recourse to other sources of information at the risk of being charged with undue delay. If this were not so, a serious derogation from belligerent rights would arise.

This decision contains little that is new, but Lord Merriman's judgment incorporates some useful clarifications of the earlier authorities, particularly in regard to the rules of evidence as applied to prize cases.

D. H. N. Johnson

B. Private International Law

Judicial Separation

Case No. 1. *Matalon* v. *Matalon*, [1952] 1 All E.R. 1025, confirms the principle enunciated in *Armytage* v. *Armytage*[3] that the mere residence of the parties in England is sufficient to give an English court jurisdiction to entertain a suit for judicial separation. As a decree of judicial separation effects no change in the status of the parties, there is no reason in principle why an English court should decline jurisdiction in proceedings of this type where both parties are resident, though not domiciled, in England, though difficulties may arise as to the meaning of the word 'resident' in this connexion; this indeed was the main point at issue in *Matalon* v. *Matalon*.

[1] 2 B. and C.P.C. 1; 4 Ll. P.C. 1.

[2] 3 B. and C.P.C. 955; 10 Ll. P.C. 25. See also the article by Fitzmaurice in this *Year Book*, 22 (1945), pp. 73–95.

[3] [1898] P. 178.

The parties were married in England in 1946, the husband being resident in and domiciled in Jamaica, where the matrimonial home was established and where a child of the marriage was born in 1947. In 1949 the wife left her husband and returned to England. In August 1950 the husband came to England, partly on business and partly to secure custody of the child. In October 1950 the wife presented a petition for judicial separation, on the ground of cruelty, alleging that while neither she nor her husband was domiciled in England, she and also her husband were resident in England. By his answer, the husband declared that he was not, at the commencement of the proceedings, resident in England, and contended that the court therefore had no jurisdiction in the matter. This issue was directed to be tried first, and Mr. Commissioner Rhodes held that the extent and quality of the husband's residence in England was sufficient to give the court jurisdiction to entertain a suit for judicial separation.

The Court of Appeal dismissed the husband's appeal against this order. Hodson L.J., in a diffuse but illuminating judgment, analysed the concept of 'residence' in relation to jurisdiction over judicial separation suits. Counsel for the husband had argued that *Armytage* v. *Armytage* really decided not what amounted to sufficient residence to give jurisdiction, but whether residence in a case of this kind gave jurisdiction at all. Hodson L.J. found no difficulty in accepting this view, but maintained that, although the point had not been directly decided in *Armytage* v. *Armytage*, sufficient guidance had been given in that case to enable the extent and quality of the residence necessary to found jurisdiction to be ascertained. On the facts, and following that guidance, an assumption of jurisdiction was justified.

It can hardly be said that this decision represents any advance on the existing law; it merely confirms what was implicit in *Armytage* v. *Armytage*, namely, that the 'residence' of a respondent in England for the purposes of jurisdiction in a suit for judicial separation need amount to little more than presence within the jurisdiction at the time when proceedings are commenced.

Affiliation Orders

Case No. 2. In *R.* v. *Wilson, Esq., ex parte Pereira*, [1952] 2 All E.R. 706, the Divisional Court affirmed the principle, first enunciated in *R.* v. *Blane*[1] and recently followed in *Tetau* v. *O'Dea*,[2] that bastardy proceedings cannot be brought in England in respect of a child born abroad to a mother who was domiciled abroad at the time of the birth.

On 15 July 1950 the applicant, a British woman domiciled in Gibraltar, gave birth to an illegitimate child in Gibraltar. In 1952, when resident in England, she applied for an affiliation order against the putative father, an Englishman domiciled in England. The magistrate asserted that he had no jurisdiction to make the order, and the Divisional Court upheld his refusal to make the order.

As the facts in this case were similar to those in *Tetau* v. *O'Dea*, the principal argument advanced on behalf of the applicant was that the decision in *Tetau* v. *O'Dea* had been overruled by s. 27 (2) of the Maintenance Orders Act, 1950, which provided:

> 'It is hereby declared that any jurisdiction conferred by Part I of this Act, or any enactment therein referred to, upon a court in any part of the United Kingdom is exercisable notwithstanding that any party to the proceedings is not domiciled in that part of the United Kingdom; and any jurisdiction so conferred in affiliation proceedings shall be exercisable notwithstanding that the child to whom the proceedings relate is not born in that part of the United Kingdom.'

Lord Goddard C.J. rejected the argument that *Tetau* v. *O'Dea* had been explicitly overruled by this subsection of the Act. The *ratio decidendi* of *Tetau* v. *O'Dea* was not the nationality of the parties, but the fact that the child was born abroad of a mother domiciled abroad at the time of the birth. If, at the time of the birth, both the mother and putative

[1] (1849), 13 Q.B. 769.
[2] [1950] 2 All E.R. 695; noted in this *Year Book*, 27 (1950), p. 472.

father had been domiciled in England, then there would have been no bar to the proceedings, whether the child was born abroad or not.[1]

The principle behind this series of cases is now clear; the English courts will refuse to make an affiliation order in respect of a child whose status is governed by some foreign law, viz. the law of the domicil of his mother at the time of the birth. This principle may be sound in itself, but it undoubtedly works hardship in the case where, at all material times, the putative father is domiciled in England and has all his assets there. It may in theory be possible for the mother to obtain an affiliation order in the courts of her domicil, but this order, being an order *in personam*, will not be enforced in England unless the putative father had been present within or submitted to the foreign jurisdiction at the relevant time.[2]

Legitimation.

Case No. 3. The facts in the case of *Re Hurll*, [1952] 2 All E.R. 322, were very complicated, though the issue which Harman J. had to decide was clear cut when reduced to its essentials: does s. 8 of the Legitimacy Act, 1926, limit or abridge the operation of the old common law rules either directly or indirectly so as to prevent a plaintiff, who may be entitled at common law to take under a disposition made before his birth, from taking under that disposition?

By his will, dated in 1934, a testator who died in 1939 left all his estate, both real and personal, to his trustees on trust for sale and, subject to the usual directions, gave one-third of the proceeds on trust for his daughter, *A*, during her life and after her death 'in trust for all the children or any the child of my said daughter who being male shall attain the age of twenty-one years or being female shall attain that age or previously marry and if more than one in equal shares absolutely'. When the will was made, and at the time of the testator's death, *A* was married to *X*, an Italian domiciled in Italy; in April 1943 she obtained a declaration from a competent Italian court that her marriage was void. In 1942 she had formed an association with *Y*, also an Italian domiciled in Italy, and in July 1943 a child, the plaintiff, was born to her in Italy. In 1949, *Y*, who was still domiciled in Italy, married *A* in England, and it was not disputed that by Italian law the plaintiff was thereby legitimated.

It was further admitted that, if the Legitimacy Act, 1926, had not been passed, the plaintiff would have been entitled to take under the terms of the trust. He would have been regarded, by reason of the fact that his father was domiciled both at the time of the birth and at the time of the marriage in a country which permits of legitimation *per subsequens matrimonium*, as the legitimate son of his parents.[3] Moreover, the fact that the child was born subsequently to the coming into operation of the relevant instrument made no difference in this respect at common law.[4]

Harman J. stated this position and then proceeded to examine the circumstances of the case in relation to the Legitimacy Act, 1926. By the combined operation of ss. 1 (3) and 3 (1) of the Act, legitimated persons could take interests in real and personal property only under dispositions coming into operation after the date of legitimation, i.e. after the date of the Act or the marriage of the parents, whichever is the later.[5] In the present case, however, the testator's will had come into operation before the marriage of the parents. Moreover, as the will had not been dated before 1927, the plaintiff could not take advantage of the saving clause,[6] which affects only dispositions coming into operation before the commencement of the Act.

Now the plaintiff, if he was to be regarded as having been legitimated under the Legitimacy Act, 1926, must, as his father was domiciled in Italy at all relevant times, have been legitimated by virtue of s. 8 (1) of the Act:

'Where the parents of an illegitimate person marry or have married one another,

[1] *R.* v. *Humphrys, ex parte Ward*, [1914] 3 K.B. 1237. [2] See *infra*, p. 486.
[3] *In re Grove* (1887), 40 Ch. D. 216; *In re Goodman's Trusts* (1881), 17 Ch. D. 216.
[4] *In re Grey's Trusts*, [1892] 3 Ch. 88. [5] S. 1 (1). [6] S. 10 (2).

whether before or after the commencement of this Act, and the father of the illegitimate person was or is, at the time of the marriage, domiciled in a country, other than England and Wales, by the law of which the illegitimate person became legitimated by virtue of such subsequent marriage, that person, if living, shall in England and Wales be recognized as having been so legitimated from the commencement of this Act or from the date of the marriage, whichever last happens, notwithstanding that his father was not at the time of the birth of such person domiciled in a country in which legitimation by subsequent marriage was permitted by law.'

In the last phrase of this section lay the key to a solution of the problem. If the phrase cut down the category of persons legitimated by virtue of the section to persons whose father was *not* domiciled in such a country at the time of the birth, then it had no application to the plaintiff whose father was domiciled in Italy at all material times; but if it applied generally and was not limited to this special class, then it might be said that the Legitimacy Act had, apart from its express savings, abridged the rights of a person to be recognized at common law as having been legitimated.

Harman J. found little difficulty in holding that s. 8 (1) applied only to those persons whose fathers were not domiciled at the time of the birth in a country which permitted legitimation by subsequent matrimony. He approached the problem by investigating the nature and purpose of the Act:

'*Prima facie* I should have expected this Act to be one conferring legitimacy on persons who would not have been regarded as legitimate before the Act.'[1]

On this premise, it was clear that to have interpreted s. 8 (1) in such a way as to deprive the plaintiff of his pre-existing common law rights would have been to do violence to the fundamental object of the Act. The phrase introduced by the word 'notwithstanding' was one of the qualifications of the section and the section did not therefore apply to the plaintiff who was entitled to rely on his common law rights.

This decision is worthy of note in that it draws attention once again to the series of cases preceding the Legitimacy Act which established the principle that a person may be recognized as legitimated in England if the father was domiciled, both at the time of the birth and at the time of the marriage, in a country which permits legitimation by subsequent matrimony. It had been considered that these cases had, for all practical purposes, been rendered obsolete by the more liberal provisions of the Legitimacy Act, 1926, but this case provides further evidence (if such were needed) of the anomalies that may unintentionally be caused by legislation. The narrow construction put on s. 8 of the Act is, it is submitted, justifiable in view of the fact that the obvious intention of the legislature was merely to provide that domicil at the time of the birth in a country which permits legitimation should no longer be a determining factor in recognizing a particular person as legitimated in England.[2]

Case No. 4. The case of *Starkowski* v. *Attorney-General*, [1952] 1 All E.R. 495, is notable for its affirmation of the principle *locus regit actum* in relation to the formalities of marriage and for its rejection of an ingenious argument put forward on behalf of the petitioner in an action for a declaration that he had been legitimated by the subsequent marriage of his parents.

On 19 May 1945 *H* went through a ceremony of marriage in Austria with *R* according to the rites of the Roman Catholic faith. At that time, the German Marriage Law of 1938 was still in force in Austria, and by that Law the marriage was invalid as it had not been contracted before the civil authorities. On 26 June 1945 the provisional Government of Austria published an order validating all marriages concluded after 1 April 1945 by ministers of a recognized church or religious community 'as from the date of solemnization . . . as soon as they have been entered in the Family Book kept by the register office'.

[1] [1952] 2 All E.R. 322 at p. 325.

[2] For further comment on this case see *L.J.* vol. 102, p. 605.

In July 1945 *R* and *H* left Austria and late in 1946 they came to settle in England. In the summer of 1947 *R* and *H* parted, and subsequently *H* met *M*, by whom in March 1949 she gave birth to the petitioner, *C*. In July 1949 the ceremony of marriage between *R* and *H* was registered in accordance with the Austrian order of 26 June 1945. On 11 February 1950 *H* went through a ceremony of marriage with *M* at a register office in England. *C* now sought a declaration that *M* and *H* were lawfully married and that he, *C*, had been legitimated by this marriage.

Two arguments were advanced against the petitioner's claim:

(i) the marriage of 19 May 1945 between *R* and *H* was a valid marriage on the day that it was solemnized because at that time both *R* and *H* were of Polish nationality and, according to Polish law, such a ceremony, even if not valid according to the *lex loci celebrationis*, would be recognized as a valid marriage in the Austrian part of Poland;

(ii) alternatively, the object of the Austrian order of 26 June 1945 was to validate such a ceremony of marriage as took place in this case, and, therefore, the religious ceremony was made a valid marriage as from the date of the ceremony as soon as it was registered on 18 July 1949.

Barnard J. rejected the first argument. It had been quite definitely settled, so far as English law was concerned, that the principle *locus regit actum* applied to any question concerning the formal validity of a marriage.[1]

The second contention appeared worthy of more serious consideration. If the marriage had been retrospectively validated (and all the Austrian lawyers agreed that this was the effect of the registration of 18 July 1949), then *H* had no capacity to contract a further marriage with *M* on 11 February 1950. For the petitioner it was urged that *H* had come to England in 1946 with the legal status of a spinster, and had thereafter acquired a domicil of choice in England; any subsequent foreign law purporting to change her status could only have territorial effect. In support of this latter proposition, reference was made to *Lynch* v. *Paraguay Provisional Government*,[2] but Barnard J. considered that, as the principal point for determination in the proceedings before him was the validity of the second 'marriage', regard must be had to Austrian law as it existed at the time of the second ceremony:

> 'This case [*Lynch* v. *Paraguay Provisional Government*] would have been a strong authority for the petitioner if the second ceremony of marriage had preceded the registration of the first ceremony of marriage.'

Scott v. *A.-G.*,[3] where a personal disability imposed by a foreign law was disregarded, was also irrelevant, because the Austrian law did not appear to impose such a disability. If the registration had been effected after 11 February 1950, and the Austrian order could be interpreted as preventing a re-marriage between the coming into force of the order and the actual registration, then this argument might have had some force. *Re Luck*[4] was also distinguishable, for, although it was accepted that no provision of a foreign law will be regarded in the English courts as effective to change the status of a person not domiciled in that country at the time, in the present case the law of the foreign country was in force, at least potentially, before *H* ever acquired an English domicil.

Barnard J. therefore held that the retrospective nature of the Austrian legislation was not invincibly repugnant to English law and that, in considering the validity of the second ceremony, he must consider whether both parties were free to marry at the time of that

[1] *Berthiaume* v. *Dastous*, [1930] A.C. 79; noted in this *Year Book*, 12 (1931), pp. 182, 194.

[2] (1871), L.R. 2 P. & D. 268; in this case it was held that succession to moveable property in England is governed by the law of the deceased's domicil as it existed at the time of his death, and no subsequent changes in that law, even though having retrospective operation, could be recognized as affecting the distribution of personal property in England.

[3] (1886), 11 P. D. 128.

[4] [1940] 3 All E.R. 307 at p. 315; noted in this *Year Book*, 21 (1944), pp. 206–10.

ceremony. *H* was not so free to marry because 'she had gone through a ceremony of marriage with another man, who was still alive, and according to the *lex loci celebrationis* that was a valid marriage'. The marriage of 11 February 1950 between *H* and *M* was therefore invalid, and the petitioner was illegitimate.

On appeal, the Court of Appeal upheld Barnard J.'s decision.[1] Somervell L.J. rejected the argument that the principle whereby a marriage good by the *lex loci celebrationis* is good everywhere must be restricted to a marriage good by the *lex loci celebrationis* as it existed at the date of the ceremony.

The object of validating acts is to remedy what has been done in good faith, and any defect in the form of a marriage can only be remedied by the legislature of the place of the marriage. The fact that one or both of the parties were at the time of the validating legislation, or subsequently became, domiciled elsewhere should not exempt them from its provisions.

It will be noted that the Court of Appeal has adopted a rather wider principle than that put forward by Barnard J. The latter had put some reliance on the fact that the Austrian order had been enacted before the parties left Austria,[2] but the Court of Appeal did not consider this circumstance necessarily relevant:

> 'Though we do not base our judgment on the fact that Order 31 was enacted before the parties left Austria this might have been an obstacle in the way of the petitioner if counsel's main submission had commended itself to us. It is only necessary to add this. We agree with the learned judge that a different and more difficult question would have arisen if the second ceremony of marriage had taken place before the registration. In the absence of any express provision under the foreign law, the conclusion might depend on the state of knowledge of the parties as to the likelihood or possibility of validation, so it had better be left to be dealt with if and when it arises.'

It is submitted that this decision is, from a practical point of view, commendable. It is the *lex loci celebrationis* which can alone pronounce on the formal validity of a marriage; and if the *lex loci celebrationis* passes legislation subsequently validating ceremonies of marriage which were, in their inception, formally invalid, that legislation should in principle bind parties who have, since the ceremony, become domiciled elsewhere. The difficulties attendant upon the alternative principle that subsequent validating legislation should not bind parties who have in the meantime acquired another domicil become clear if we consider what would have been the situation if *H* alone, and not *R*, had come to England in 1946 to settle permanently. If we assume that she had, at that time, sufficient capacity to acquire a separate domicil, then any subsequent registration of the marriage would not affect her status in England as a *feme sole*; but her status in Austria after the registration would unquestionably be that of a married woman. Adoption of the alternative principle would thus inevitably lead to the creation of another species of the familiar but always regrettable 'limping marriage'.

Contracts

Case No. 5. One of the normal presumptions of English private international law is that a contract entered into abroad is governed as to its essentials by the *lex loci contractus* unless a contrary intention can be inferred from the circumstances.[3] A further illustration of the operation of this presumption is to be found in *Keiner* v. *Keiner*, [1952] 1 All E.R. 643, where Donovan J. had to determine, as a preliminary issue, the proper law of a contract executed in the State of New Jersey.

The plaintiff husband had entered into a deed in New Jersey whereby he had undertaken to make certain payments to his wife. When the wife brought proceedings against

[1] [1952] 2 All E.R. 616.

[2] [1952] 1 All E.R. 495 at p. 499.

[3] See *Jacobs* v. *Crédit Lyonnais* (1884), 12 Q.B.D. 589 at p. 600; *P. & O. Steam Navigation Co.* v. *Shand* (1865), 3 Moo. P. C. (N.S.) 272; *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79 at p. 82.

him in the High Court in England in respect of certain arrears, he consented to an order for payment of £6,000; he paid £2,000 of that amount in full, but when tendering the balance deducted income tax on the whole £6,000 in accordance with rules 19 and 21 of the All Schedules Rules of the Income Tax Act, 1918. As the wife disputed the right of her husband to deduct tax in this manner, contending that the proper law of the deed under which the payments had become due was the law of New Jersey, the husband brought the present proceedings for a declaration that the judgment obtained against him by the wife had been satisfied, and, alternatively, that he was entitled to satisfy the judgment by payment of the total sum less tax; he claimed also an injunction to restrain his wife from levying execution on the judgment or otherwise seeking to enforce it.

Donovan J. held that the rights and obligations of the parties *inter se* were governed by the contract entered into between them, i.e. by the deed executed in New Jersey. It was therefore fundamental to the plaintiff's case to show that that contract was governed by English law incorporating the Income Tax Act, 1918. Counsel for the plaintiff contended that the parties intended English law to apply to the deed for the following reasons:

(i) at the time of execution of the deed, the husband was ordinarily resident in the United Kingdom and the wife was ordinarily resident in the United States of America;
(ii) after the execution of the deed and as a result of it, the husband had no assets in the United States of America;
(iii) the wife had sued him in respect of the arrears in an English court.

Donovan J. rejected these arguments.

> 'The payments under the deed were to be made in dollars; by cl. 2 the law, either of the State of New York or of the State of New Jersey, is specifically incorporated in the deed for the purpose of determining in what securities certain funds shall be invested; certain rights of inspection are created by cl. 4 which in the normal course would be exercised in America; and in the [earlier] proceedings before McNair J. the husband himself specifically asserted that the deed was governed by the law of New Jersey.'

He consequently found that the law of New Jersey governed the contract, and this finding demolished the husband's case, for he could not rely, as against the wife, on the provisions of an English income tax statute; *vis-à-vis* the Inland Revenue authorities he might be bound to deduct and pay over tax on the payment, but his obligations towards the wife were laid down in the deed which, if governed by the law of New Jersey, took no account of the Income Tax Act, 1918.

This case adds little to our knowledge of what factors are relevant to a determination of the proper law of a contract, but it is significant that Donovan J. rejected completely any implication that because proceedings had been brought in an English court, the deed was governed by English law.

Money

Case No. 6. It is a procedural peculiarity of English law that an English court cannot give judgment for a sum of money expressed in a foreign currency; thus, if an obligation to pay a certain sum of money in a specified foreign currency is sued upon in England, the English court must give judgment in pounds sterling by converting the foreign money obligation into sterling at the appropriate rate of exchange. That this system can give rise to difficulties and embarrassments has been made abundantly clear,[1] for fluctuations in exchange rates may make it vitally important to determine whether conversion into sterling should be effected at the rate of exchange prevailing on one particular date rather than another. This was the essence of the problem which the Court of Appeal had to determine in *Cummings* v. *London Bullion Co.*, [1952] 1 All E.R. 383.

In July 1949 the plaintiff, while on a visit to England, bought a brooch from the defen-

[1] See Mann, *The Legal Aspect of Money* (1938), pp. 306 ff.

dants for $3,200, it being an agreed condition of the contract that, if the plaintiff returned the brooch within an agreed time, the defendants would re-purchase it at the same price; both parties understood that, under the Exchange Control Act, 1947, the permission of the Treasury would have to be obtained before the defendants could re-pay the plaintiff in dollars. On 15 August the plaintiff returned the brooch to the defendants, but the defendants did not apply for Treasury permission until September, and permission was not in fact granted until 29 September. On 18 September, sterling was devalued from the rate of $4.02 to the pound to $2.80. The sum of $3,200, which before 18 September was worth £796, was now worth £1,142. In an action against the defendants the plaintiff claimed the sum of £1,142; the defendants contended that the date to be taken to ascertain the conversion rate was 15 August, and that therefore they were only liable for £796. Slade J. held that the debt had become payable on 15 August, but the Court of Appeal reversed this decision and found in favour of the plaintiff.

The first point to determine was whether the decisive date for the conversion of the dollar debt into sterling should be the date when the money ought to have been paid under the contract (the 'breach date') or the date when the court gives judgment (the 'judgment date'). The previous law on this topic was by no means clear. Although it had been held that the 'breach date' rule governed claims for unliquidated damages in contract,[1] and that, with regard to damages in tort, the date to be adopted was that on which the loss was suffered by the plaintiff,[2] there was some confusion of authority as to what date should be taken in the case of an action for a liquidated contractual debt. The weight of authority was unquestionably in favour of the 'breach date' rule,[3] and the Court of Appeal had in terms adopted the 'breach date' rule in *Madeleine Vionnet et Cie* v. *Wills*.[4] As against this, the Court of Appeal had also decided in *Société des Hôtels Le Touquet* v. *Cummings*[5] that the debtor of a debt payable in France in French francs could discharge his obligation, after a writ had been taken out in the English courts, by payment of the nominal amount of French francs, despite the fact that, had the English action proceeded to judgment and the date when the debt became due had been taken, the plaintiff would, as the franc had depreciated after that date, have recovered a sum in sterling which would have been equivalent at the time of the judgment to a very much larger sum in francs than the amount of the original debt.

Somervell L.J. held that the two cases were reconcilable in that the *Le Touquet* case did not purport to adopt the 'judgment date' rule:

> 'It is clear from the judgments that the court did not base its decision on the principle that, if no payment in francs had been made, the francs would fall to be converted at the date of the judgment. Atkin L.J. stated expressly ([1922] 1 K.B. 465) that that point was open and there is a sentence to the same effect in the judgment of Bankes L.J.'

On this basis, he held himself bound by the 'breach date' rule as exemplified in the *Vionnet* case.

But how was the 'breach date' rule to be applied to the facts of this particular case? Counsel for the plaintiff contended that, having regard to the provisions of the Exchange Control Act, 1947, the debt was not due within the meaning of the decision in the *Vionnet* case until the permission of the Treasury required under that Act was granted. Somervell L.J., having investigated the provisions of the Act, accepted this contention. The effect of s. 33 (1) of the Act was that there must be read into the contract a term that payment is not to be made except in so far as Treasury permission is given; having regard to this section, the date when payment became due must have been the date when Treasury permission was given, viz. 29 September. Somervell L.J. recognized that this interpre-

[1] *Di Ferdinando* v. *Simon Smits & Co.*, [1920] 3 K.B. 409 (C.A.).

[2] *S.S. Celia* v. *S.S. Volturno*, [1921] 2 A.C. 544.

[3] *Re British American Continental Bank, Ltd., Crédit Général Liégeois' Claim*, [1922] 2 Ch. 589; *Peyrae* v. *Wilkinson*, [1924] 2 K.B. 166; *Graumann* v. *Treitel*, [1940] 2 All E.R. 188.

[4] [1940] 1 K.B. 72; noted in this *Year Book*, 21 (1944), p. 216.

[5] [1922] 1 K.B. 451.

tation involved a further parodox. By virtue of Schedule IV of the Act, the plaintiff could have sued and obtained judgment against the defendants before the permits had been applied for; in these circumstances, the defendant could, once a writ had been issued, have legally discharged his obligation by paying whatever was, at the then rate of exchange, the appropriate sum in sterling into court. Thus, it was only by postponing the issue of the writ until after devaluation that the plaintiff was able to recover the full sterling equivalent of his dollars.

It has already been argued[1] that the final adoption of the 'breach date' rule by the Court of Appeal is regrettable; it is indeed difficult to concede that the decision accords with common sense and logic. In fact, it was only by a very strained interpretation of the concept of the date when a debt becomes payable that the Court was enabled to render substantial justice to the plaintiff. It is submitted that the 'judgment date' rule, although it may, in certain circumstances, work to the advantage of the debtor, e.g. where, between the date when the debt falls due and the date when judgment is given, the foreign currency depreciates in relation to sterling, is nevertheless preferable to the 'breach-date' rule. If *A* has contracted to pay *X* to *B* on a certain date, then that obligation should be satisfied by the payment of what is, at whatever time payment is made, the sterling equivalent of *X*. The risk of appreciation or depreciation of sterling in relation to the foreign currency should lie where it falls, so long as the debt remains stable in terms of the foreign currency. This principle has been succinctly stated in the United States Supreme Court:

> 'An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it.'[2]

It is to be hoped that the House of Lords will soon have occasion to review this series of cases.

Case No. 7. Another case in which the main point for decision was the date at which an obligation to pay a stated amount of foreign currency should be converted into sterling is *East India Trading Co. Inc.* v. *Carmel Exporters and Importers, Ltd.*, [1952] 1 All E.R. 1053. On 11 May 1950, following a breach of contract by the defendants in June 1949, the plaintiffs obtained a final judgment against the defendants in the Supreme Court of the State of New York. The plaintiffs now sued upon this judgment for £11,703, being the sterling equivalent of the sum for which they had obtained judgment calculated at $2.80 to the pound, the rate of exchange prevailing at the date of the New York judgment. The defendants contended that the correct date for ascertaining the rate of exchange at which the judgment debt should be converted into sterling was the date when the breach of contract occurred, viz. June 1949, when the rate of exchange was $4.03 to the pound.

Sellers J. held that, as the American judgment was a judgment for a fixed sum, and was final and conclusive, it could be sued upon in the English courts.[3] Although it was contended on behalf of the defendants that the plaintiffs could have sued in this country on the original cause of action, viz. the breach of contract, and would, by so doing, have been able to recover only damages assessed at the date of the breach of contract,[4] Sellers J. considered this unexceptionable:

> 'For myself, I see less objection to a plaintiff who has obtained judgment rather than a defendant who is in default being in a position to select the most advantageous course. A rigid rule may have the advantage of certainty, but I apprehend that in some circumstances it might prove advantageous to the party in default, and equally disadvantageous to the innocent party.'

[1] See Kahn-Freund in *Law Quarterly Review*, vol. 68, pp. 163–7.
[2] *Deutsche Bank Filiale Nuernberg* v. *Humphreys* (1926), 272 U.S. 517 *per* Mr. Justice Holmes.
[3] *Nouvion* v. *Freeman* (1888), Ch. D. 244; (1889), 15 App. Cas. 1.
[4] *Di Ferdinando* v. *Simon Smits & Co. Ltd.*, [1920] 3 K.B. 409.

Following *Madeleine Vionnet et Cie* v. *Wills*,[1] Sellers J. held that, in the case of enforcement of a foreign judgment, the decisive date for conversion of the judgment debt into sterling was the date on which the debt became due. This was the date of judgment of the original court, 11 May 1950.

As was pointed out, a decision in this sense is consistent with the Foreign Judgments (Reciprocal Enforcement) Act, 1933,[2] which was not directly applicable to the case, as there is no reciprocal arrangement of the type contemplated under the Act between the United Kingdom and the United States. The decision is in itself sound, although it is perhaps unfortunate that indirect support is once again given to the 'breach date' rule propounded in the *Vionnet* case.

Administration of Estates

Case No. 8. *In the Estate of Kaufman*, [1952] 2 All E.R. 261. This was an application for letters of administration in respect of the estate of a man who died intestate domiciled in Holland. The application was made by the deceased's brother, who was the person entitled in English law to such a grant. The Registrar, in accordance with a Procedure Direction[3] dated 1 March 1951, ordered that evidence be filed as to the person entitled, under Dutch law, to administer the estate. The applicant appealed against this direction by the Registrar.

Lord Merriman P. held:

(i) that the Procedure Direction of 1 March 1951 correctly set out the practice to be followed;
(ii) that, in the special circumstances of this case, however, a grant should be made in the applicant's favour even if it involved a departure from the correct practice.

Lord Merriman's judgment embodies a brief historical survey of the practice followed by the courts before the Procedure Direction of 1 March 1951; that practice had involved the granting of letters of administration to those persons who, according to English law, would have been entitled to a grant had the deceased died domiciled in this country. However, it was clear from certain cases, notably *In the Goods of Earl*[4] and *In the Goods of Briesemann*,[5] that the grant should be made to the person who had been clothed by the court of the domicil of the deceased with the power and duty of administering the estate. Although these cases depended on the fact that administration had already been granted to the applicant by the courts of the domicil, there was no objection in principle to an extension of the principle to cases in which the applicant, though not actually clothed with the authority of the foreign court, was nevertheless entitled to a grant by the law of the deceased's domicil.

However, in view of certain doubts which had been raised as to whether the Procedure Direction of 1 March 1951 allowed sufficient discretion to the courts, Lord Merriman restated the practice as follows:

> 'Whether the applicant is a person who has been entrusted with the administration by a court of foreign domicil, or is merely entitled by the law of the domicil to administer, although no such grant has been obtained, it is perfectly correct that the grant should be made as a 'section grant',[6] but, in my opinion, it is desirable that it should appear on the face of the grant in which of these capacities he is being given the grant.'

Foreign Judgments

Case No. 9. The principle that the English courts will not recognize or enforce a foreign judgment *in personam* affecting the acquired rights of an English national who was

[1] [1940] 1. K.B .72. [2] S. 2 (3). [3] [1951] *Weekly Notes*, p. 167.
[4] (1867), L.R. 1 P. & D. 450. [5] [1894] P. 260.
[6] A 'section grant' is a grant made under the discretionary powers conferred on the court by s. 73 of the Court of Probate Act, 1857, and s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928.

neither present within nor submitted to the foreign jurisdiction was confirmed by the Court of Appeal in *British Nylon Spinners, Ltd.* v. *Imperial Chemical Industries, Ltd.*, [1952] 2 All E.R. 780.

By a contract made in March 1947 the defendant company agreed to grant exclusive licences[1] to the plaintiff company under certain English and Commonwealth patents which it had acquired by an agreement dated 31 December 1946 from a company incorporated in the United States of America. At all relevant times, both the plaintiff and the defendant company were incorporated and domiciled in England. In an action brought in the United States of America under the anti-trust laws against the American company, the defendant company and others, it was ordered that the agreement of 31 December 1946 be cancelled and that the defendant company re-convey to the American company, within ninety days, all the patent rights assigned to the defendant company under the agreement. The present proceedings involved an application by the plaintiff company, which was not a party to the American proceedings, for an interlocutory injunction to prevent the defendant company from parting with any of the patent rights acquired by it under the agreement.

The Court of Appeal held:

(i) that the plaintiff company had acquired, under the contract of March 1947, which was an English contract made between English nationals and to be performed in England, a right, amounting to a 'species of property' to the grant of an exclusive licence under the patents;

(ii) that the plaintiff company in this case was 'neither a subject nor a national of the United States, nor (unlike the defendant company) was it a party to the proceedings before the district judge, nor is it otherwise subject to his jurisdiction';[2]

(iii) that the order of the American Court purported to destroy or qualify the statutory rights of an English national not subject to the jurisdiction of the American Court;

(iv) that the order therefore amounted to an 'assertion of extra-territorial jurisdiction' on the part of the American Court, which an English court would not recognize.

This decision is a slight extension of the familiar doctrine that foreign judgments *in personam* will not be enforced in England unless the party concerned had been present within[3] or submitted[4] to the foreign jurisdiction at the time proceedings were brought. In this case the plaintiff company had not been concerned at all in the American proceedings, and it was only by reason of the fact that it could be said to have acquired a proprietary interest in English law under the English patents that the English Court felt justified in holding (*a*) that the order of the American Court infringed that right, and (*b*) that the American order should therefore not be enforced.

I. M. Sinclair

[1] No licences were in fact granted, but the plaintiff company carried on the manufacture of nylon without any objection on the part of the defendant company.

[2] [1952] 2 All E.R. 782–3 *per* Evershed M.R.

[3] *Carrick* v. *Hancock* (1895), 12 T.L.R. 59; *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155.

[4] *Copin* v. *Adamson* (1874), L.R. 9 Ex. 345; (1875), L.R. 1 Ex. D. 17.

REVIEWS OF BOOKS

Académie de Droit International de la Haye: Recueil des Cours. Volumes 76 and 77. Paris: Recueil Sirey. 1951. 715 pp. and 614 pp. respectively.

The lectures delivered at the Academy of International Law at The Hague each year, representative as they are of the scholarship of many countries, must be taken to reflect to a certain extent the main preoccupations of international lawyers at the time when they are delivered. It is of interest to find that of the eleven courses delivered in 1950 all but two were concerned with problems of international organization rather than with the substantive rules of international law. At least, that is true if the phrase 'international organization' is used in its wider connotation, namely, as meaning the integration of states and peoples by the development of legal procedures. The present two volumes of the *Hague Recueil* recall forcefully the fact that this is, indeed, the main problem of our time.

Four of the lectures are concerned with methods and procedures for protecting, on an international plane, the rights of individuals. Maître Carabiber, in a lecture concerning 'L'arbitrage international entre Gouvernements et particuliers', examines the development of procedures for settling disputes between private persons and foreign states, with special reference to the direct participation of states in international commercial arbitration. M. Jean-S. Pictet, Director of the International Committee of the Red Cross, in a study entitled 'La Croix-Rouge et les Conventions de Genève', discusses the international protection of sick and wounded, prisoners of war, and civil populations in time of war. Professor J. Graven, in an exhaustive historical and jurisprudential course, surveys the efforts made to prevent, by international measures, the commission of 'Crimes against Humanity'. On a more general plane, Professor A. A. Berle affirms his belief in the growth, at the present time, of a community of peoples, as opposed to a community of states; a community which may give more solid guarantees of 'Peace between Nations'.

A fifth lecture, that of M. L. Kopelmanas on 'Le Contrôle international', comprises a general survey of the problem of international administrative organization. In a scholarly study M. Kopelmanas examines the different forms of international control of the observance of legal rules, including the utilization, to that end, of state organs; international discussion; international inquiry and inspection; and direct international administrative control. Finally, three lectures are concerned with questions of international organization in the narrower, institutional, sense of the term. Professor Clyde Eagleton, under the title 'International Organization and the Law of Responsibility', discusses the nature of international claims by and against the United Nations and the procedure applicable to them. Professor G. Vedovato examines various legal questions relating to 'Trusteeship Agreements'. Last but not least, Mr. C. W. Jenks examines the problems created by the already existing multiplicity of international institutions in a lecture entitled 'Co-ordination: the new problem of international organization'. The substance of that study will no doubt already be familiar to readers of this *Year Book* from the survey of the subject published by Mr. Jenks in the volume for 1951.

Of the remaining two lectures one is the 'general course' covering the main subjects of public international law. In 1950 the course was delivered by Professor Henri Rolin, eminently qualified for that task. The other is an historical study by M. J. Moreau-Reibel. While probably of more limited interest than the other lectures, it will provide

fruitful matter for readers interested in the work and thought of the canonists and of Grotius.

These two volumes more than maintain the high standard we have come to expect of the *Hague Recueil*. It is thus almost embarrassing to have to criticize their presentation. Printing errors are probably unavoidable in any large work. However, in some of the English lectures the number of such errors is disquietingly high. Since the *Recueil* is printed in France, it is to be expected that the English contributions will require careful revision in proof. This may involve extra financial outlay, and may slightly retard the publication of the volumes. However, since it was decided in 1947 that the Academy and its publications should henceforward be bilingual, the consequences of that decision must be faced. F. M.

Annuaire de l'Institut de Droit International. 2 Volumes. Basle: Éditions juridiques et sociologiques S.A. 1952. 1,212 pp.

These volumes contain the preparatory work and the Minutes of the Forty-fifth Session of the Institute of International Law, held at Siena in 1952. Amongst the preparatory work are to be found a number of papers of considerable interest, such as Mr. Ernest Lémonon's report on the Jurisdictional Immunity of States (which incorporates some useful observations by Sir Eric Beckett on English practice); a report by M. Charles Rousseau on the topical question of Domestic Jurisdiction; a report by M. Alexandre Makarov on the Effect of Territorial Changes on the Rights of Individuals; some further observations and a 'projet' by Professor Lauterpacht on the Interpretation of Treaties; a report by M. Donnedieu de Vabres on the Proposal for an International Criminal Court; a Draft Compulsory Jurisdiction Clause (for insertion in treaties) prepared by M. Paul Guggenheim; and a report by M. Georges Sauser-Hall on Arbitration in Private International Law. As for the Minutes of the Session, the first question to be discussed was M. A. de La Pradelle's report on 'Les effets internationaux des nationalisations', which had been prepared for the 1950 session at Bath. Since the *Anglo-Iranian Oil Co.* case was just about to be heard by the International Court, the choice of subject apparently gave rise to some embarrassment. After rejecting by twenty votes to sixteen, with twenty-two abstentions, a controversial text to the effect that a state was bound to respect obligations undertaken towards the nationals of foreign states as well as towards foreign states themselves, the Institute decided to pass on to another subject. Some discussion took place on the question of treaty interpretation, particularly in regard to the utility of *travaux préparatoires*. A resolution was also adopted safeguarding the principle that 'territorial changes leave intact those patrimonial rights which were duly acquired before the change took place', provided, however, that concessions incompatible with the legal régime of the successor state may be terminated on condition that equitable compensation is paid. The most important work of the session was undoubtedly the adoption of a resolution, based on a proposal by M. Guerrero, to the effect that the election of the members of the International Court of Justice, 'being concerned with persons, not with States, should be kept altogether apart from the elections relating to the other organs of the United Nations, and should take place at the nearest possible date to the opening of the Session of the Assembly and immediately after the closure of the general opening debate'. In this way, and also by a proposal that, when the General Assembly and the Security Council meet to elect new Judges, no communications should pass between them 'save only the official announcements made by each body to the other, of the results of their respective electoral meetings', it is hoped to reduce the element of political bargaining which has

occasionally marred the election of new members of the Court. However, these are only immediate recommendations. The Institute in the same resolution decided to undertake a study of the improvements that might be made in the Statute of the Court, with a view to its possible revision. The initiative of M. Guerrero and of the Institute in this matter will be widely welcomed. D. H. N. JOHNSON

Year Book of the United Nations, 1951. Department of Public Information, United Nations, New York. 1,030 pp. £4. 10*s*. 0*d*.

Year Book on Human Rights, 1951. United Nations, New York, 1952. 596 pp. £2. 7*s*. 6*d*.

Both obtainable through H.M. Stationery Office, London.

The above are the two most important unofficial publications of the United Nations. One of the distinguishing and highly commendable features of the *Year Book of the United Nations* is that, in addition to containing a detached account of current developments within the year under review, it also gives basic information with regard to the various agencies whose work is reviewed. The result is that, in a sense, each issue of the *Year Book* is self-sufficient and, except for special purposes, is an almost complete book of reference. It is very much hoped that the Editors of the *Year Book* will continue that policy, which may minimize substantially the disadvantages of the—probably unavoidable—high price of each volume. Particular attention may be drawn in this connexion to the excellence of the Section on the Specialized Agencies, in which that method has been most usefully employed.

The Editors of the *Year Book on Human Rights* have been confronted with a most difficult task of selection—a task the almost insoluble nature of which counsels restraint in any tendency to criticize the work of those responsible for the compilation. At the same time it is clear that unless the Editors impose some limit, however arbitrarily determined, upon the nature of the material reproduced the *Year Book on Human Rights* may become a Year Book reproducing almost the entire legislation of states and a very substantial part of the decisions of their courts. Thus, for instance, the only contribution, printed in full, from Argentina is 'an Act concerning Lease and Transfer of State Lands to Agricultural Workers'. From Australia there is a report, referred to as a 'decision', of the Commonwealth Court of Conciliation and Arbitration on the question of the basic wage. The contribution from Canada consists of extracts from the Unemployment Insurance Act, 1940, a Section of the National Defence Act of 1950 providing for a Court Martial Appeal Board, and one Article from the Canadian Citizenship Law. From Egypt there are Acts on nationality, industrial accidents, compensation for occupational diseases, and social and health services in agricultural holdings. From India the *Year Book* reproduces the Preventive Detention Act, 1950, and judicial decisions bearing on restrictions on wholesale trade, preventive detention, and restriction of the freedom of the press. The contribution from the United Kingdom consists entirely of a description of recent legislation on legal aid. In the Section on Specialized Agencies several pages are devoted to the Agreement of 1950 on Importation of Educational, Scientific, and Cultural Materials.

Any emphatic criticism of the selection of material must, in relation to a publication of this kind, be captious and unhelpful. However, in the opinion of the reviewer there is room for a reconsideration, without any imputation of criticism, of the purposes and limits of the *Year Book*. Such inquiry might be usefully undertaken by the Commission on Human Rights. H. L.

Communicazioni e Studi. Volume III. Roberto Ago, General Editor. Istituto di diritto internazionale e straniero della Università di Milano. Milan: A. Giuffrè. 1950. 355 pp.

This series of studies published under the guidance of Professor Ago goes far to fill the gap which has been apparent since the cessation of the *Rivista di diritto internazionale*. Both public and private international law are the object of detailed theoretical articles, and the surveys of the practice of Italian courts provide a solid basis of factual information. The book reviews appear to aim primarily at introducing the Italian readers to the current literature abroad. In the present volume Professor Ziccardi gives an account of the work of Anzilotti in the field of public and private international law. His careful analysis is somewhat weighted in favour of Anzilotti's writings on private international law, and fails to consider his work as a Judge of the Permanent Court of International Justice. Professor Morelli's topic is 'The Extinction and Solution of International Disputes'. Starting from the distinction between political and legal disputes, he regards claims and their extinction as pre-judicial acts, while their solution is a legal question. Professor Paradisi discusses the place of the initial hypothesis, developed by the school of Kelsen, and of the contractual theory in the light of the history of international law and of contemporary political theory. He concludes that the organization of society precedes the rules which govern individuals. The former is a non-individual expression of will, while the latter are commands. Professor Sperduti reviews the objective and subjective doctrines relating to state responsibility and holds that the discussion is fruitless. Instead, he concludes, the problem to be investigated is that of direct or indirect liability. Professor Giuliano, in a thoughtful and well-documented article, surveys the historical problems which face the international lawyer. He stresses that the need of the present time is not a history of the rules of international law but of the factors which created this new legal order. Thus the study of international relations with special regard to the creation of rules of conduct, or, on a more limited scale, the historical study of treaties is most likely to prove fruitful. Dr. Biscottini studies the problem of the appropriation of maritime wealth. He attempts to develop a distinction between the acquisition of sovereignty over territory, on the one hand, and of the right to economic utilization, on the other hand. Although the concept of international rights in the nature of property has found some support in recent times (e.g. Ubertazzi, *Studi sui diritti reali nell' ordine internazionale* (1949)), the theoretical conclusions of this well-documented article may not be readily acceptable everywhere. Dr. Decliva contributes a short and somewhat inconclusive study of the relations between international unions. Private international law is represented by two articles. In the first, Dr. Serra examines the provision of the Italian Code which introduces free choice of law. His well-balanced conclusions are independent of, but in keeping with, most recent trends in other countries. In particular his assumption that the problem of free choice of law or not is a problem of selecting a connecting factor deserves approval. Dr. Migliazza offers a careful examination of the question what law governs ineligibility to benefit from a succession. The surveys of the practice of the International Court of Justice (Migliazza) and of the Italian courts in matters of public and private international law (Capotorti and Ziccardi) are exhaustive and stimulating.

The same willingness to learn, to reconsider old problems, to investigate new fields and to participate in the intra-national dissemination of legal knowledge makes itself felt in the extensive section of book reviews. The appearance of further volumes is to be welcomed everywhere.

K. Lipstein

I Diritti Assoluti nell' Ordinamento Internazionale. By GIUSEPPE BARILE. Monografie dell' Istituto di Diritto Pubblico della Facoltà di Giurisprudenza, Università di Roma. Nuova Serie, 4. Milan: A. Giuffrè. 1951. 383 pp. Lire 2,000.

In recent years several attempts have been made in Italy to bring back into the sphere of international law concepts taken from private law. Such attempts were made by Ubertazzi, *Studi sui Diritti Reali nell' Ordine Internazionale* (1949), and by Biscottini in *Communicazioni e Studi*, 3 (1950), pp. 121–58. The author of the present work rejects Ubertazzi's construction of rights *in rem* (p. 138) and introduces instead, as a basic notion, the concept of absolute rights in international law. This concept is defined (p. 351) as consisting, first, of fundamental rights of states, secondly, of rights which cannot be given up, and, thirdly, of rights *erga omnes* which may be the object of legitimate defence in case of necessity.

In order to establish his thesis that in international law there are to be found two types of rights, one which is absolute in character and one which is relative, being based upon treaties, the author surveys virtually the entire sphere of the international law of peace with the exception of those branches which are based upon treaties only, such as the law of extradition. After defining his concepts in a chapter devoted to subjective and absolute rights, the author turns to the bases of international law. He adopts the view expressed by Ago, *Scienza Giuridica e Diritto Internazionale* (1950), reviewed in this *Year Book*, 27 (1950), pp. 484–6, that international law is the product of spontaneous creation, except for that part which is normative and positive. This enables him to assert, as being at the basis of international law, the fundamental distinction between absolute rights and treaty-created relative rights. With this distinction in mind he surveys, one by one, the various rules of international law. Thus, from one point of view, the author has written a well documented, balanced and clear exposition of the main principles of the international law of peace. Whether he has succeeded in his primary object, namely, to establish the nature and the sphere of absolute rights (as defined above) in international law, may be open to question. In the first place, little room is devoted to the other category of rights envisaged by the author, i.e. relative rights which arise from treaties. On the face of it, most rights in international law appear thus to be absolute. In the second place, in the absence of any difference in the remedies available, the distinction drawn by the author between absolute and relative rights may not possess that significance which the author appears to attribute to it. In the third place, some of the few practical instances given by the author (p. 318) are hardly convincing. It is not easy to see why claims on the ground of state responsibility for damage to property of nationals involve absolute rights, while similar claims arising out of the failure of the defendant Government to honour its debts involve a positive duty and are therefore not absolute. Nevertheless, the book as a whole provides an occasion for welcoming an attempt to re-examine the fundamental bases of international law in a new light.

K. LIPSTEIN

Contributo alla Teoria degli Atti Unilaterali nel Diritto Internazionale. By GIUSEPPE BISCOTTINI. Studi di Diritto Internazionale, edited by R. Ago and G. Balladore Pallieri. Volume 16. Milan: A. Giuffrè. 1951. 184 pp. Lire 800.

It is difficult to do justice to this thoughtful work, mainly for reasons which the author himself indicates when he states (p. 14): 'The course of my research has

frequently led me to establish distinctions which may appear too subtle and theoretical, and I have asked myself whether the criticism raised by a foreign scholar against the Italian school may perhaps be justified. . . .' The author has chosen a subject which has remained much neglected, except for Pflüger's *Die einseitigen Rechtsgeschäfte im Völkerrecht* (1936). His method is theoretical, on the ground that abstract research must precede factual exposition. Actually, such a division cannot be consistently maintained, and the work is based both on theoretical considerations and on generalizations derived from the practice of states.

The author proceeds from the proposition that unilateral acts in international law are made up of 'acts of ascertainment', expressions of intention based upon an evaluation of facts, and expressions of intention unconnected with any factual situation. From this point of view he analyses the recognition of states and governments regarded as unilateral acts. Viewed from this angle, the constitutive theory of recognition identifies the act of recognition with an act of ascertainment of facts, while the declaratory theory assumes that it involves an expression of intention based upon an evaluation of facts. The author distinguishes between the recognition of a new government, which he regards as merely involving the ascertainment of a fact, and the recognition of a new state, which, in his opinion, requires an expression of intention based upon an evaluation. He is thus driven to reject the declaratory theory of recognition as well as the suggestion that recognition involves an absolute duty. However, he admits that the future belongs to the latter (p. 109). The ensuing sections deal with *de jure* and *de facto* recognition and with the legal construction of the act of revoking recognition, with the recognition of belligerents and of insurgents, with discovery and occupation. The last chapter is concerned with simple expressions of intention, such as offers, promises, renunciations and revocations. The significance of the book lies in its treatment of well known material problems of international law in the light of a single theoretical concept taken from private and administrative law. K. L.

La satisfaction comme mode de réparation en droit international. By Pierre André Bissonnette. Geneva. 1952. 185 pp.

This work, written as a thesis for the Institut Universitaire des Hautes Études Internationales at Geneva, consists of an attempt to isolate satisfaction as a mode of reparation in international law and to study the peculiar characteristics of this method of obtaining redress for injury. The author, whose style throughout is attractive and readable, distinguishes between *restitutio in integrum*, damages ('dommages-intérêts'), and satisfaction. The third of these modes of reparation has, he considers, been neglected by international lawyers, who have treated it as a political instrument rather than as a legally recognized method of obtaining redress for an international wrong. *Restitutio in integrum* is described as 'le mode de réparation par excellence', but it is—as the author admits—rarely used. The difficulty of denationalizing the property of foreigners nationalized in a manner contrary to international law and the difficulty of ordering the judgments of national courts to be set aside are cited as examples. In view of these difficulties, recourse is usually had to pecuniary damages. Around pecuniary damages, as the author rightly says, there has developed a considerable body of jurisprudence, the chief characteristic of which is that the purpose of pecuniary damages in international law is, as a rule, compensatory rather than exemplary. Satisfaction and *restitutio in integrum* are alike distinct from damages in that they are not essentially pecuniary. *Restitutio in integrum*, however, differs from all other forms of reparation in that it is 'essentiellement restitutif', whereas they are not. By a process of elimination,

therefore, satisfaction emerges as a mode of redress, which is neither essentially restitutive nor essentially pecuniary. Satisfaction is a generic term, including such incidents as demands for apology and regrets, for salute of the flag and other forms of expiation, for the punishment of those directly responsible for the injury and assurances against repetition of the events complained of: it may contain a pecuniary element but, when it does, the money demanded is usually in the form of exemplary rather than compensatory damages. These various modes of reparation, the author says, are often not distinguished in practice, in that all, or at least two of them, may be demanded in respect of the same wrong. In the *Corfu Channel* case, however, the parties, when they concluded the *compromis*, asked the Court to decide: (i) whether there was any duty to pay 'compensation' in respect of the explosions which damaged the destroyers and caused loss of life; and (ii) whether—assuming that the Royal Navy's minesweeping operations constituted a violation of Albania's sovereignty—there was any duty to give 'satisfaction'. The author continues his analysis by discussing the treatment of satisfaction by the leading writers and by the learned societies. From this analysis it emerges that satisfaction is essentially a mode of redress for a *moral* wrong done to a state, but the relationship between the wrong done and the redress required is still so imprecise—at any rate so far as 'la doctrine' is concerned—as to cause serious doubt whether satisfaction is in truth a legally recognized form of redress as opposed to a mere political and diplomatic weapon. The author attempts to remove the confusion by a study of the actual practice of states. This leads him to distinguish between moral wrongs caused directly to the state and moral wrongs caused indirectly to the state. Among the former are violations of territory or territorial waters, attacks or insults on the agents of the state (Head of State, diplomats, consuls, members of official missions or of the armed forces), violations of embassies, legations or consulates, illegal acts performed against ships, outrages on flags or emblems and even injurious words and writings, if spoken or written by someone in authority. By contrast, moral wrongs caused indirectly to the state are essentially wrongs done in the first place to individuals. Satisfaction, as a mode of reparation for moral wrongs, takes the form *either* of apology, including some form of expiation or assurances for the future, *or* of the payment of money. When it takes the latter form, it is distinguishable from damages in that it is confined to securing reparation for the *moral* wrong done directly or indirectly to the state. M. Bissonnette here faces a major difficulty—and one which has been much discussed—namely, that of determining, when a pecuniary sum is paid to a state whose national has been injured, what proportion of the sum is to be considered as 'satisfying' the moral wrong caused to the state as distinct from repairing the wrong done to the national, which may itself be either moral or material. When 'exemplary' or 'punitive' damages are awarded, the difficulty largely disappears. But damages of this type are not often awarded by arbitral tribunals and, as a rule, the sum awarded is based solely on the wrong estimated to have been done to the national. The author admits that 'exemplary' damages are more common in diplomatic practice than in the awards of arbitral tribunals, but this is largely because they are often expressly excluded by the *compromis*, in which case the state concerned must be taken to have waived its claim to receive this particular mode of reparation. The fact that 'exemplary' damages are rare in arbitral practice does not mean, therefore, that they are not recognized as a legally valid form of redress, or that satisfaction is not recognized by international tribunals as the proper form of redress for a moral wrong. The appreciation of a moral wrong itself being an arbitrary matter, it does not follow that the sum awarded must be large. For instance, in the *Brower* case in 1923, the Commission ordered Great Britain to pay to the United States the nominal sum of one shilling. The International Court of Justice itself in the *Corfu Channel* case,

having declared that the British action in sweeping for mines in Albanian territorial waters constituted a violation of Albanian sovereignty, proceeded to state that this declaration was 'in itself appropriate satisfaction'—an interesting example in that the satisfaction consisted of a declaration made not by Great Britain herself but by an international tribunal in a judgment binding on her. Apart perhaps from a slight tendency towards oversimplification, this work (which is itself written with admirable clarity) is an interesting and valuable study of one of the principal problems connected with the responsibility of states. It is accompanied by a useful bibliography.

D. H. N. JOHNSON

State Insolvency and Foreign Bondholders. By EDWIN BORCHARD. Volume I: General Principles; Volume II: Selected Case Histories of Governmental Foreign Bond Defaults and Debt Readjustments. New Haven: Yale University Press; London: Geoffrey Cumberlege, Oxford University Press. 1951. xxx+381 pp. and xxv+652 pp. £8. 2*s*. 6*d*.

The first volume of this work, written almost entirely by the late Professor Edwin Borchard, apparently in close collaboration with Dr. Joachim von Elbe, contains a discussion of the principal legal problems to which bonds issued by foreign governments have given rise. It is divided into six parts: the International Government Loan (dealing with the nature of the loan contract, its main provisions, and the law applicable to it); Types of Loans (external and internal, secured and guaranteed loans); Default on Government Loans (conception, types, and causes of insolvency, including the effects of war); Bondholders' Remedies (legal, economic, organizational, and diplomatic); Financial Control; Readjustments of Governmental Defaults (including priorities and preferences).

The second volume, written by Mr. William H. Wynne, contains eight 'case histories' comprising an account of the defaults of Mexico, Peru, Santo Domingo, Greece, Portugal, Turkey, Bulgaria, and Egypt. In each case the author discusses the financial history leading to the accumulation of the bonded debt, the origin of the defaults, the negotiations for and the methods of a settlement. This volume is descriptive in character. The factual material presented by it is illuminating and, since access to it is a matter of considerable difficulty for the average student, he will greatly welcome what must be regarded as a unique collection of sources. But it is only the specialist who will have occasion to turn to this volume for instruction. He will not be disappointed in his search, though he will regret that the volume does not include the further studies that were written on Serbia, Venezuela, Nicaragua, Salvador, Honduras, Haiti, Tunis, and Morocco, and also that the worst and to a lawyer most interesting defaulter, Germany, did not find a place in a book written between 1931 and 1935. Moreover, there may be some who would have preferred Mr. Wynne to give better particulars of the contractual terms upon which the various issues were made, to supply something in the nature of an encyclopaedia of forms or at least to discuss comprehensively questions of drafting.

Professor Borchard's volume is much the more important one from the point of view of international lawyers as a whole. However, it sets the reader a puzzle by omitting any indication as to the time when it was written: not even the Preface is dated. One cannot help feeling that the book was written in the thirties and not brought up to date before publication. Thus the statement, supported only by a reference to Professor Borchard's *Diplomatic Protection of Citizens Abroad* (1915), that international law creates obligations between states alone and that 'there is an element of ambiguity and

fiction in considering the individual as a subject of international law, although an increasing number of Conventions confer rights upon him' (p. 14), today sounds a little old-fashioned. The discussion of the gold clause (pp. 23, 24, 30 ff.) disregards many steps in a development which long ago outpaced the suggestion (p. 33) that the mere addition 'of the word "gold" . . . is of itself no proof that the parties intend to express the debt on a gold basis'. The decision of the House of Lords in *British & French Trust Corporation* v. *New Brunswick Railway Co.*, [1939] A.C. 1, is not mentioned. Dr. Martin Wolff's *Private International Law*, first published in 1945, is also not mentioned, but the same author's *Internationales Privatrecht* (1933) is relied upon (see, e.g., p. 70). Similarly, the author's reference to Dr. Cheshire's *Private International Law* is to the second edition (1938), not to the third (1947). On the question of whether the statute of limitation runs during a war, nothing of the more recent material appears on p. 151. The examples could be multiplied.

Nevertheless, there can be no doubt that Professor Borchard's work contains a very useful analysis of the law relating to government bonds. It will in future be the starting-point for everyone interested in this branch of the law, though it may not express the final word on the subject from the viewpoint of the year 1953. Professor Borchard is at his best when he deals with matters of public international law as opposed to private law. What he says about diplomatic protection, financial control, or priorities and preferences is of particular value. It must, however, be regretted that Professor Borchard devoted so much learning to a subject which is likely to be a matter of the past, and that he refrained almost entirely from pointing to the lessons and thus from building for a possible future. Is it conceivable that, in the light of the experience of more than a hundred years, during which legal process has largely proved ineffective, private investors will again be prepared to lend money to foreign governments? If so, what can be done to improve the securities upon which they used to rely in the past and which in most cases have proved illusory? The point is illustrated by the discussion relating to trustees in international loans (pp. 45 ff.). Professor Borchard states, perhaps a little too categorically, that a trustee of a loan 'is in duty bound to take the steps indicated to him for the enforcement of the creditors' rights whenever the debtor fails to live up to the terms of the contract' (p. 57). But how often have trustees done this? And how often have bondholders been inveigled into the belief that the existence of trustees afforded them real protection? Similar thoughts are provoked by the chapter on Securities (pp. 81 ff.): it lacks any constructive suggestion for making them effective in practice. To the modern reader this book, with all its great achievements, is likely to appear as an epilogue rather than a foundation stone. F. A. MANN

Festschrift für Martin Wolff. Beiträge zum Zivilrecht und internationalen Privatrecht. Herausgegeben von ERNST VON CAEMMERER, F. A. MANN, WALTER HALLSTEIN, LUDWIG RAISER. Tübingen: J. C. B. Mohr (Paul Siebeck). 1952. vi+413 pp. DM. 39.75 (bound in cloth: DM. 43.50).

Fittingly, this collection of essays in honour of an outstanding authority in the field of private and comparative law and of the conflict of laws, contains contributions in each of these fields. Here it must suffice to draw attention to those which fall more particularly within the compass of private international law. Professor Bühler discusses the international foundations of the conflict of laws. In the first place, he holds that international law operates through the doctrines of characterization and public policy. It may be objected that both, in introducing institutions of foreign domestic law or in excluding them, are faced with the problem of reconciling different legal systems, but

not on an international plane. Next he relies on the effect of recognition upon the application of foreign law, without however considering the most recent literature on this subject: see *Transactions of the Grotius Society*, 35 (1950), pp. 157–88. He is on surer ground when dealing with international conventions in matters of private international law. He proceeds to examine whether it is possible to ascertain rules of international law. He recognizes that this question is controversial but finds positive support in the rules of recognition, the exclusion of foreign confiscatory legislation, and the common acceptance of certain rules of the conflict of laws. Finally, he passes to an examination of the validity of his conclusions in the realm of international tax legislation. The article would have benefited from closer attention to the contribution in other countries to the same problem, such as Niederer in *Schweizerisches Jahrbuch für Internationales Recht*, 5 (1948), pp. 63–82, with literature; Lipstein in *Transactions of the Grotius Society*, 27 (1942), pp. 142–75, and 29 (1944), pp. 51–83; the same in *British Year Book of International Law*, 26 (1949), pp. 553–5; Nussbaum in *Columbia Law Review*, 42 (1942), p. 42; Stevenson, ibid., 52 (1952), pp. 561–88; Streit in *Festgabe für Fleiner* (1927), pp. 318–51; Makarov in *Mélanges Streit*, vol. i, pp. 535 ff.; Ottolenghi, *Rapporti tra il diritto internazionale privato e il diritto delle genti*; and Paradisi, 'Osservazioni sul rapporto storico tra diritto internazionale pubblico e il diritto internazionale privato', in *Studi Senesi* (1945).

Dr. W. Goldschmidt, developing ideas first expressed in 1935, studies the philosophical basis of the conflict of laws. His practical conclusions show him to be in sympathy with the foreign court theory. On the other hand, this theoretical position may not be acceptable to those who believe that rules of private international law have no material content but are the product of policy and practical convenience. Professor Kronstein's informative article is of topical interest to English readers since he attempts to explain the new American doctrines of the conflict of laws in the light of the conflict between the United States and European countries arising out of anti-trust proceedings. In particular, the contribution of Learned Hand C.J. is thus presented in its proper setting.

Professor Makarov, in a well documented and lucid article, traces the gradual development of the General Part of the French Draft on Private International Law which is to form part of the Civil Code. Dr. Mann, in a well balanced study, offers his solution of the question how to determine the nationality of a corporation. His conclusion in favour of the law of the country of incorporation should find widespread approval. Dr. Morris presents what must be regarded as the most detailed critical and constructive account of the recognition of polygamous marriages in English law. Professor Wengler's writings always deserve careful attention, although his style tends to obscure his train of thoughts. He has chosen the problem of characterization, which he studies in the rarified atmosphere of abstract propositions. His main concern is the object of characterization, which may either consist in the claim which is presented to the court or in the legal provision of foreign law, regarded without reference to the claim. The author favours the latter technique (p. 358), but appears to have had second thoughts (p. 365). In the opinion of the reviewer, the former technique is to be preferred. No other is suitable for Anglo-American law, for here the parties must plead and prove foreign law, but only in relation to the claim. In other words, the party pleads the facts in the light of the rights flowing therefrom according to the foreign law which he believes to be applicable, and the witnesses give a hypothetical judgment, without expounding abstract rules of foreign law to be applied by the court. This method avoids a positive or negative conflict of characterization, which forms the object of Professor Wengler's subsequent considerations.

Finally, Dr. Ernst Wolff offers a detailed and well informed commentary on the Draft Convention on the legal status of companies and associations prepared by the Seventh Hague Conference of 1951. K. LIPSTEIN

Le Droit de veto dans l'Organisation des Nations Unies. By GEORGES DAY. Paris: Éditions A. Pedone. 1952.

'Droit de veto'. La Règle de l'unanimité des membres permanents au Conseil de Sécurité. By PIERRE F. BRUGIÈRE. Paris: Éditions A. Pedone. 1952.

The factors which promote interest in further contributions to the study of the *droit de veto*, the term by which the rule of unanimity has been popularized, are not necessarily of a legal nature. Yet, as M. Day points out, the procedure of voting adopted in an international organization is not a problem of political morality or philosophy but of legal technique, and the criterion by which it must be judged is a functional one. Moreover, the veto cannot be understood as a pernicious innovation, nor as the cause of the failures of the Security Council, but only as one effect of the retention of a principle recognized in international conferences throughout the nineteenth century—the principle of sovereign equality—in consequence of which no sovereign state could be bound by an international obligation against its will. Yet, as both authors hasten to demonstrate, that equality can be satisfied in the conclusion of the treaty on terms of equality and need not require an equality of rights under the treaty; the confusion between legal equality and functional equality amongst member states of an international organization has caused much of the emotional, and often irrelevant, pleadings of Article 2 (1) of the United Nations Charter. That this particular aspect of sovereignty, expressed in the power to refuse an international obligation, should be retained by the five major Powers alone may be unfortunate; it is based, however, on what Jessup has so aptly called 'the inescapable fact of power differentials'. So long as there exist no agreed criteria upon which voting power should be allocated in a political organization, the clumsy expedient of a veto is likely to remain.

The problem is, however, not one of principle so much as one of the application of that principle. The principle of the exceptional powers of the permanent members of the Security Council, expressed in the veto, has been accepted—it is the application of that power which is called in question. The importance of the San Francisco Statement as an interpretation of this power becomes at once obvious. Whilst M. Brugière remains somewhat non-committal on the binding force of the interpretation, for M. Day it is a 'quasi-authentic' interpretation of the Charter which, whilst not binding on members other than the permanent members as a matter of law, is in fact binding on the whole Security Council, in so far as any course of action based upon an interpretation not in accord with the San Francisco Statement would be stultified eventually by the veto of a permanent member. Yet, for both authors, as a source of interpretation of the Charter provisions, the Statement can be only secondary to the Charter itself. For M. Day the Statement is (p. 57): 'Une interprétation résultant de l'Exposé n'est valable que dans la mesure où elle ne déroge pas au texte de la Charte.' Yet neither author regards Article 103 of the Charter, which asserts the primacy of obligations of members under the Charter over their obligations under any other international agreement, as relevant here. This is all the more surprising as M. Day carefully examines the legal effect of the Statement in the light of general principles of law governing treaty obligations. Accepting the view of the Charter as the primary source of interpretation, it follows that the Preliminary Question, which, according to the Statement is governed

by the unanimity rule, can only be taken in the form of a 'double veto' when the Charter itself contains no indication of the appropriate voting procedure. In these cases of real doubt, the criterion is for M. Brugière that 'du but ou d'intention' (p. 165). One may wonder whether this really clarifies the distinction between 'questions de procédure' and 'questions de fond', or whether this criterion would not itself afford equal scope for a divergence of views.

Chapter II of M. Brugière's book, dealing with particular cases of the application of the unanimity rule, and Part III of M. Day's book, covering what he terms 'la jurisprudence' of the Security Council, contain those aspects of the Council's work which have occasioned the most controversy. At the outset M. Day enters a caveat in using the word 'jurisprudence'; he points out, and rightly so, that the Security Council is not a judicial body but one which is 'chargé, aux termes de la Charte, non pas de rendre la justice, mais de mener une action politique . . .' (p. 102). It is as well to point out that, at least in the sphere of pacific settlement of disputes and situations, the Council is under a duty to bring about a settlement in conformity with justice and international law (Article 1 (1)). Whatever the sphere of action of the Council, the Purposes and Principles of the Charter, vague as they may be, are binding on all organs of the United Nations, including the Security Council.

The particular problems of Abstention and Absence are stated well enough by M. Brugière, but his conclusions as to the compatibility of decisions taken by the Council in these circumstances with a strict interpretation of the Charter are somewhat terse. M. Day, on the other hand, develops the interesting thesis that, whilst the Security Council has no power of interpretation contrary to the clear meaning of the Charter, there is a power of development, revision, or amendment through the growth of customary practices. These 'extra-legal amendments' (p. 125) can find a legal basis only in the consent of those Members of the Organization whose consent is necessary to a formal amendment under Article 108. In the case of the practice of Abstention, the necessary consent has been evidenced in the attitude of the members; but so far as Absence is concerned (which he rightly refuses to equate with Abstention) the refusal of consent by one permanent member to the proposition that a non-procedural vote taken in the absence of a permanent member is valid, must necessarily mean that such a vote is illegal. The counter-argument depends, so M. Day asserts, on an unjustifiable approval of the question of treaty interpretation, and he cites the Advisory Opinion on the *Interpretation of the Peace Treaties* (*I.C.J.*, 1950): 'Le principe d'interprétation . . . souvent désigné sous le nom de principe de l'effet utile, ne saurait autoriser . . . à entendre la clause . . . insérée dans les traités . . . dans un sens qui . . . contredirait sa lettre et son esprit.' It is perhaps unkind to turn this quotation against M. Day and to suggest that this same limit must be applicable to those *de facto* or 'extra-legal' amendments in a treaty which contains express provisions for amendment. Even more forcibly the Court states: 'It is clear that the refusal to fulfil a treaty obligation involves international responsibility. Nevertheless, such a refusal cannot alter the conditions contemplated in the Treaties' (at p. 228).

The current problem of the representation of Member states in the organs of the United Nations is dealt with by both authors. M. Day arrives at the following conclusion: 'Une décision régulièrement prise par le Conseil [and he does not doubt the regularity of the present representation under the Charter and rules of procedure of the Security Council] sur un problème de représentation d'un de ses membres s'impose à tous les États qui font partie des Nations Unies' (at p. 152).

In quoting the recommendations of the General Assembly of 14 December 1950, he cautions readers that a decision of the Assembly on the representation of a Member

state in no way legally binds the other organs. M. Brugière falls into the common error of confusing recognition of states with the quite distinct problem of what authority is to be recognized as the government of a state. No one denies that China is a state, nor that she is a Member of the United Nations; the sole question is, which of the two competing claims to represent her in the Organization shall be recognized.

The Memorandum of the Secretary-General of 9 March 1950 indicated merely that the qualifications for membership contained in Article 4 are of importance as showing which is the 'effective' government; this is not the same thing as assimilating the problem with that of the recognition of states.

In conclusion, it might be said that the work of M. Brugière is a painstaking, accurate, and factual account of the history and practice of the unanimity rule, which is concluded by an examination of the proposals, direct and indirect, for reform. It is a work which, as the Preface admits, is expository rather than critical. As a collection of basic materials it is competent throughout, but it will not satisfy the international lawyer who is acquainted with those materials and looks for a more constructive approach to the problems raised. There is nowhere a single reference to any of the already extensive literature on the subject. Some of this literature is worthy of M. Brugière's attention and would have perhaps induced a more critical approach.

M. Day's book, on the other hand, is based upon a critical analysis of the problems involved. One might wish, perhaps, that the Iranian affair had been dealt with in its bearing on the Security Council's competence over its agenda, that the possible ambiguities in Article 94 had been broached, and that the contradictions between Articles 29 and 34 had been dealt with more conclusively. However, these are minor criticisms in relation to a work which is interesting and stimulating. D. L. Bowett

The Conflict of Laws. By R. H. Graveson. Second edition. London: Sweet & Maxwell, Ltd. 1952. xxxii+455 pp. 35*s*.

The first edition of this book was published in 1948. In 1949 Professor Graveson published his *Cases on the Conflict of Laws*, and the second edition of his earlier work, now some seventy pages longer, incorporates references to decisions included in his *Casebook*. There are other additions, notably a final chapter on 'The Limits of Application of Foreign Law', in which are gathered together such topics as public policy, English ideas of justice and morality, foreign penal laws and revenue laws, and something which appears under the heading of 'English Law of Extraterritorial Operation'. This last turns out to relate to the rule that, in the absence of express provision or necessary implication, English statutes will not be deemed to operate outside England, with an exception in favour of 'the need to give effect to public interests regarded in their time and place as vital'. This exception is illustrated most notably by the case of *Boissevin* v. *Weil*, [1950] 1 A.E.R. 728.

In the Preface to his first edition Professor Graveson stated that it was 'written primarily for students approaching the conflict of laws for the first time'. No such claim is made in the second edition, despite the linking with the *Casebook*, and to this reviewer the omission seems just. The work appears too advanced for an introduction to the law while perhaps not sufficiently detailed to be of real value to the practitioner. Its tendency is to be argumentative, and the author occasionally intrudes an irrelevancy of his own, as where he says that in *Janson* v. *Driefontein Consolidated Mines*, [1902] A.C. 484, Lord Halsbury was 'giving judgment in an age of omniscient self-satisfaction' (at p. 439). At the same time, this book does constitute a most valuable addition to the growing number of smaller post-war books on private international law.

An interesting concept mooted by Professor Graveson is the founding of the basis of the English conflict of laws—'the need to do justice in cases involving a foreign element' —on the judicial oath, the oath taken by every judge on assuming office. This oath binds him to 'do Right to all Manner of People after the Laws and Usages of this Realm', that is, says the learned Author, to apply English law, including the English rules of conflict of laws. To carry out this obligation, he points out, requires provisions such as Order XI of the Rules of the Supreme Court extending the jurisdiction of the English court 'beyond the bounds of undisputed effectiveness'; while, on the other hand, personal attributes of plaintiff and defendant are irrelevant to the exercise of English jurisdiction *in personam* save in the case of alien enemies, foreign states and sovereigns and diplomatic representatives. Interesting too, and somewhat unusual in a book of this kind, is the section headed 'Tendencies towards Unification of the Conflict of Laws', whose contents are indicated by the sub-headings 'International Legislation', 'International Associations of Lawyers', 'The American Law Institute's Restatement' and 'American Uniform Acts' (pp. 16–20).

The question of Classification is dealt with in the second Chapter, which some might think rather early in the book, an impression which is supported by a footnote to the Chapter heading which reads: 'Those unfamiliar with the main ideas of the conflict of laws are recommended to postpone reading this chapter and the next until they have read the rest of the book' (at p. 31)—the next Chapter being headed 'Connecting Factors and the Doctrine of Renvoi'. By 'connecting factors' is meant the points of contact between the facts of a given case and the legal system which ultimately governs it, i.e. the situation of the property, the domicil of the party or the proper law of the contract. From an exposition of these connecting factors it is an easy transition to the doctrine of renvoi, and the whole Chapter is, one would think, within the scope of an intelligent beginner.

On the respective merits and demerits of domicil and nationality as a basis of the personal law Professor Graveson usefully points to the modern tragedies of statelessness (as well as the occasional incidence of dual nationality) as a natural consequence of the adoption by many continental countries of the idea of nationality. He goes on to point out that domicil was far more acceptable both in the British Commonwealth and in the United States of America, where a single nationality covered a variety of independent legal systems. The great advantage of domicil over nationality is that 'every person must have one, and only one, operative domicile at the same time'—so much is unexceptionable—but to say, as he does (at p. 67), that domicil is 'based on the common law principle of individual liberty of choice of the legal system under which one lives' is to make an assertion that lacks both clarity and convincingness. Professor Graveson is apparently so convinced of the superiority of domicil over nationality that he gives the latter but the barest mention, and his only reference to the British Nationality Act, 1948, is to section 23 (1) (legitimation by subsequent marriage). Many who have been used to consult the classical books on conflict of law—Dicey, Foote, Westlake, and so on—for the pre-1948 law concerning British nationality will be disappointed by the omission here of any full treatment of the new law, which contains at least one new major conception and is altogether more complex than the old. The book treats the topic of domicil of origin on familiar lines, but finds itself rather out of its depth when dealing with the acquisition of the domicil of origin of a foundling. In the absence of judicial authority it suggests that, where a German-speaking child is found in England, 'a presumption should exist in favour of a German-speaking country'—as though there were but one or two such countries in Europe—and where a child is discovered as a stowaway on a ship which has reached England from abroad, the presumption should

be 'in favour of the country from which the ship sailed or that of its last port of call', which one may be forgiven for terming fanciful and unlikely to commend itself to an English judge.

The Chapter on 'The Contract and Status of Marriage' is closely reasoned and treats the subject at length and in detail. It is not clear, however, why it is separated by some 200 pages from the Chapter on 'Matrimonial Causes'. The number of very recent cases quoted as illustrations—from *Baindail* v. *Baindail*, [1946] P. 122, and *Apt* v. *Apt*, [1947] P. 127, to *Maher* v. *Maher*, [1951] P. 342, *Risk* v. *Risk*, [1951] 1 K.B. 50, and *Pugh* v. *Pugh*, [1951] P. 482—shows how this branch of the law is still fluid and developing. At the same time Professor Graveson is content to cite uncritically the definition of marriage given in *Hyde* v. *Hyde* (1866), L.R. 1 P. & D. 130: '. . . the voluntary union for life of one man and one woman to the exclusion of all others'—a definition which could, so far as it goes, be applied to an indissoluble business partnership or even to cohabitation without benefit of clergy.

On the essential validity of contracts Professor Graveson attempts to reconcile the objective theory of Westlake ('the country with which the contract has the most real connection') and the subjective view of Dicey ('the law . . . to which the parties . . . intended to submit themselves'), and eventually comes to the conclusion that the proper law depends on the intention of the parties ascertained objectively and judicially —a proper conjunction seeing that in the ultimate what matters to a contracting party is the view which a court will take of his contract. In the Chapter on 'Wills', under the heading 'Essential Validity', among the examples given of restrictions in English law on testamentary freedom is the Inheritance (Family Provision) Act, 1938, which 'has been little used in practice'. But it may well be asked whether the Act goes to the validity of a will and also, seeing that applications under it are made and heard in chambers, how the learned Author knows that the Act is little used in practice.

In an attempt to compress the subject of the immunity of diplomatic representatives and their staffs into two short paragraphs (at p. 300), Professor Graveson has committed himself to one or two somewhat questionable statements. For example, he says that 'the privilege also apparently extends to consular representatives, at least if they are nationals of the foreign sovereign'—which they generally are—and cites in support *Price* v. *Griffin* (see this *Year Book*, 26 (1949) at p. 433). But the consular staffs of the United States and Germany (see *Musmann* v. *Engelke*, [1928] A.C. 433) are in a special position; they are assimilated with diplomats in a 'foreign service'; ordinarily consuls have no immunity from jurisdiction (see this *Year Book*, 21 (1944), p. 743). Needless to say, these remarks are in no way intended to question the merits of a scholarly and pre-eminently useful textbook.

A. B. LYONS

De Iure Praedae Commentarius. By HUGO GROTIUS. 2 Volumes. Oxford. 1949. [No. 22 of the series of *Classics of International Law*.] Price, in Great Britain, 84*s*.; in the United States, $10.00.

Volume I. *A Translation of the Original Manuscript of 1604*. By GWLADYS L. WILLIAMS, with the collaboration of WALTER H. ZEYDEL; with Appendices and Indexes. xxxiv+438 pp.

Volume II. *A Collotype Reproduction of the Original Manuscript in the handwriting of Grotius*. vi+326 pp.

The twenty-second—and final—contribution to the Carnegie Endowment's series of *Classics of International Law* is the *De Iure Praedae Commentarius* of Grotius. It is a

mark of the critical scholarship of the translator, Dr. Gwladys L. Williams, with whom Mr. Walter H. Zeydel collaborated in the English translation which constitutes the first volume of this publication, that the title has been translated as 'Commentary on the Law of Prize and Booty', a departure in the interests of accuracy from the traditional translation of 'Praedae' as 'of Prize' alone. As Dr. Williams points out, prize proceedings were the *occasion* rather than the *substance* of the treatise, which in point of fact covers the laws governing all property captured in war. All who have occasion to use this volume will appreciate the achievement of the translators in rendering into readable English the circumspect, intricate, and parenthetical style of the original. That achievement is in no way impaired by the circumstance that, despite the pre-eminent reputation of its author, the *Commentary on the Law of Prize and Booty* is unlikely to command universal or even wide interest. It is true that this is the first excursion of a brilliant youth into a subject of which his later works were to gain him the title of founder; that it was written in support of certain temporary but vital Netherlands claims; that the manuscript lay in oblivion for over 250 years and that its discovery created great enthusiasm; that it provides new evidence of the precocity of Grotius; and that it sheds additional light upon the development of his thought. But all these are factors which are of interest primarily to the historian. Nothing that appears in the *Commentary* can add to or substantially alter the estimate which history has already formed of its author.

The *De Iure Praedae Commentarius* was in part the product, if not of theological controversy, at least of religious uneasiness. In 1604 the Great United Company of the East Indies (commonly known as the 'Dutch East India Company') secured the condemnation in prize of the carrack *Catharine*, which had been captured on their behalf during the semi-official state of hostilities then existing with Spain and Portugal in Far Eastern waters. The proceeds of the condemnation were then distributed among the shareholders of the Company. But to some of them—in particular the members of the Mennonite sect who disapproved of war in all circumstances—while the spoils of peaceful trade were acceptable and even welcome, the proceeds of belligerent action were not. Some withdrew from the Company and others even planned to seek the patronage of Henry IV of France for the establishment of a rival, but peaceful, concern to the Company.

At this point the Company turned to Grotius. Though he was then only twenty-one, he had already been State Historiographer of Holland for four years. In that capacity he was well acquainted with the issues arising out of the condemnation of the *Catharine*. He may even have been one of the counsel for the Company in the prize proceedings. Between, it is believed, the autumn of 1604 and the spring of 1605 he wrote the *Commentary on the Laws of Prize and Booty* with the purpose of defending the justice of the war with Spain and the propriety of the seizure of enemy property. It took him no more than six or eight months to complete the task. The wonder is not merely that Grotius covered some 320 folio pages of manuscript—as the collotype reproduction which forms Volume II of this publication so clearly shows. The remarkable fact is that in doing so he had sufficient time to go back to basic principles. Hitherto he had been primarily a theologian, though he had had some practice in the courts. But he had never before had occasion to form his views into a system. The wealth of authorities and citation which at times threatens to submerge the *De Iure Pacis et Belli*, remarkable as it may be, is nevertheless the achievement of a mature scholar in his forties. Yet a perusal of the text and the Index of Authors Cited in the *De Iure Praedae* reveals that even when he was twenty-one Grotius was in a position to refer to approximately 225 different authorities ranging from Accursius to Zabarella.

The work is divided into four main parts, comprising fifteen chapters in all. In the first part, which contains preliminary matter, Grotius sets out his object: 'to enlighten the artless innocence' of 'a considerable number of Hollanders (a people surpassed by none in their eagerness for honourable gain) who are apparently ashamed to lay claim to the spoils of war'. The second part consists of *Dogmatica*, the fundamental principles governing war in general and the acquisition of spoils in particular. He elaborates and adopts as the basis of his argument a system of nine Rules and thirteen Laws which all follow upon the Rule: 'What God has shown to be His Will, that is law.' There follows, in the third portion of the *Commentary*, a historical account, not entirely free from disingenuousness, narrating generally the circumstances of the war between Spain and Holland and more particularly the events in the East Indies which led up to the seizure of the *Catharine*—a narrative which is itself of great original value in elucidating the history of that period. In the fourth section, which contains the famous Chapter XII, Grotius applies the principles set out in the *Dogmatica* to the facts related in the *Historica*. He concludes with an exhortation to merchants not to be dissuaded from their purpose, for 'the persons who imagine that there is some reason which makes it imprudent to seize and hold spoil taken from the Portuguese enemy, are in numerous ways either deceivers or deceived'.

The thesis which appears in the *De Iure Praedae* is fundamentally the same as that in the *De Iure Belli ac Pacis*, namely, that the causes of just war are identical in number and kind with the causes of just lawsuits. There are, however, a number of differences between the two works which illustrate, principally, the intervening development of the author. The system of the nine Rules and thirteen Laws disappears in the later work. There becomes manifest, instead, an increasing degree of secularism. Moreover, Grotius's classification of the law of nature alters in a manner too complex to be described here, and with that change there came alterations also in the classification of the law of nations.

The occasion which called forth the *Commentary on the Law of Prize and Booty* was, however, past even before the work was completed. In its complete form it was not published in the author's lifetime. Only a portion of it—Chapter XII—was revised and separately printed in 1609 as the *Mare Liberum*. The rest of the manuscript lay forgotten for 240 years until 1864 when it was included in a sale of a number of manuscripts belonging to the de Groot family. Though purchased by Leyden University and published in Dutch in 1934, the present translation is the first to have appeared in English. It is a consummation upon which Dr. Williams, Mr. Zeydel, and the Carnegie Endowment are all to be congratulated.

As this is the last publication to appear in the *Classics of International Law* published by the Division of International Law of the Carnegie Endowment, it is fitting that this opportunity should be taken of referring by way of appreciation to the achievement of that Series. The republication in a convenient form of the classics of international law was undertaken upon the suggestion of Dr. James Brown Scott, then Solicitor to the Department of State, under whose active supervision until his death in 1943 the work was carried out. The task, as he envisaged it, has in most respects been completed. Of those works originally published before the beginning of the nineteenth century to which Dr. Scott referred in the letter suggesting the Series, all, with the sole exception of the *De Legationibus* of Brunus, published in 1548, have been re-edited and retranslated. The list originally contemplated by Dr. Scott has only failed of completion in that, of the works published after 1800, only one, Dana's 1866 edition of Wheaton's *Elements of International Law*, has not been reprinted. The hopes which Dr. Scott expressed of producing an English translation of de Martens' *Causes célèbres* and of

republishing in convenient form the contributions to international law of Stowell, Marshall, Story, Kent, Leoline Jenkins, Heffter, and G. F. de Martens have not been fulfilled. That is not to say that the need for their publication in an accessible and readable form is not now less urgent than it was in 1906. Perhaps, if a list were drawn up today of the authorities which require republication it might not correspond exactly with Dr. Scott's. There exists a need not only for the republication of old authorities but also for the publication of sources of international law in general. For what the Carnegie Endowment has done so far, not only in connexion with the 'Classics of International Law', but also in relation to other works of reference, the profession will always remain grateful. E. LAUTERPACHT

The Case Law of the International Court. By EDVARD HAMBRO. Leyden: A. W. Sijthoff's Publishing Company. 1952. 699 pp.

The sub-title of this book is 'A repertoire of the judgments, advisory opinions and orders of the Permanent Court of International Justice and of the International Court of Justice'. The book consists of 511 citations from the judgments, advisory opinions, and orders of the two Courts, set out in English and French on opposite pages—it being made clear in every case which is the authoritative text. The citations are arranged according to subject-matter. Thus eighty-two citations relate to the interpretation of treaties, forty-five to persons in international law, ninety-six to the procedure of the International Court, and so on. There is also a list, in the two languages, of all the decisions ever given by the Court; a most useful bibliography of works relating to the Court, extending from the first drafts of a statute for the Court down to the most recent works; and, finally, a comprehensive index, again in the two languages, enabling easy reference to be made to the various citations. The book is not itself, however, an official publication of the Court or of the United Nations. If it be objected that a work along these lines is a mere mechanical effort, which in itself adds little to the literature of international law, the answer lies not merely in Mr. Hambro's official position, which precludes him from undertaking even the most modest of editorial functions, but also in the certainty that '*Hambro on the Court*', despite its obvious limitations, will, in fact, be found very shortly on the shelves of all practitioners of international law. It is essentially a volume for the practitioner, and very useful it will be. The mere appearance of such a volume is eloquent testimony to the development of international law, as a system of law, since the days preceding the foundation of the Hague Court. It is, therefore, most fitting that the preparation of this work should have been undertaken by the Registrar of the Court, assisted by two other members of the Court's staff, Mr. Douma and Miss Welsby. D. H. N. JOHNSON

Die Rechtsprechung der Nürnberger Militärtribunale. Edited by KURT HEINZE and KARL SCHILLING under the auspices of the Institut für Völkerrecht of the University of Göttingen. 1952.

To the best of the reviewer's knowledge this is the first attempt to present a comprehensive and systematic survey, in the form of short verbatim extracts, of the guiding principles laid down by the International Military Tribunal and the six American Military Tribunals at Nuremberg in thirteen major trials of war criminals. The book under review contains a total of more than 1,300 such extracts, arranged according to subjects. The first part is concerned with the instruments conferring jurisdiction upon the tribunals and the limits of competence of the latter, the second part with rules of

procedure and evidence, the third part with the general principles of international criminal law, and the fourth and fifth parts with specific criminal offences. The extracts are allowed to speak for themselves, and the editors have refrained from any comment or criticism. They have confined themselves to presenting as complete a picture of the development of this branch of the law as could conveniently be given in a book of this size. The method chosen has certain disadvantages in that repetition cannot always be avoided. On the other hand, such disadvantages as this method may entail are easily outweighed by the corresponding advantage to the reader of an elaborate and careful arrangement of the vast material which forms the basis of the selection. The arrangement is such that any principle of law which may have been enunciated by one or other of the seven tribunals can easily be found, and the task of providing so accessible a guide to scattered sources must have required a great deal of work. This may perhaps explain why the editors confined their labours to the judgments of the Nuremberg Tribunals and did not extend them to others of comparable importance. The body of jurisprudence which has grown up in this field in the course of the last few years, including as it does decisions of the highest courts of appeal of a number of countries, contains a great deal of material as yet unexplored and awaiting scientific analysis. The jurisprudence developed by the International Military Tribunal and the six American Tribunals, in spite of the importance of the cases on which it is based, is comparatively limited in scope and cannot convey a complete picture of the law on the subject. Previous attempts to analyse all the material available have, of course, been made, in particular by the editor of the *Reports of Trials of War Criminals*, but they have not been made in the form of verbatim extracts systematically arranged, as has the material contained in the book under review.

Perhaps the editors of the present volume may one day turn their attention to the case law as yet unexplored. Their pioneer work, to which the volume under review bears eloquent testimony, would certainly stand them in good stead in such an undertaking. F. HONIG

The International Labour Code, 1951. A systematic arrangement of the Conventions and Recommendations adopted by the International Labour Conference, 1919–51. With Appendices embodying other standards of social policy framed by or with the co-operation of the International Labour Organization, 1919–51. Published by the International Labour Office, Geneva. 1952. Two Volumes. clv+1,181 pp. and 1,220 pp. £3.

In 1941, at a time when, to quote the Preface to the present work, the future of the International Labour Organization was 'precarious in the extreme', the I.L.O. published a systematic and comprehensive corpus of standards established by or under the auspices of the Organization during the first twenty years of its existence. (See the review in this *Year Book*, 21 (1944), p. 246.) The Conventions and Recommendations adopted by the Conference from 1919 until the outbreak of the Second World War were arranged in the form of a Code which 'was to be used according to circumstances either as the last will and testament of the Organization or as an essential part of the title deeds to its future'. The International Labour Code of 1939 with its systematic arrangement of standards and its invaluable annotations became an indispensable stand-by for all those interested in comparative labour law and in social policy, but, owing to the vigorous development of the I.L.O. since the war and to the expansion of its activities and growing perfection of its methods, the usefulness of the 1939 Code

diminished from year to year. The publication of this new Code, the Code of 1951, is thus most welcome. Although its authors have largely adopted the well-tried structure of the earlier work, they are careful not to present the 1951 Code to the world as a new edition. So revolutionary have been the changes which have occurred since 1939 and so voluminous has been the increase in the size of the corpus that the characterization of the new Code as a mere new edition would have been quite misleading. The task confronting the authors did not consist of a series of structural alterations. They had to erect a new edifice, although they were able to use the plans of the old one.

The 1939 Code comprised, in 556 pages, 924 Articles, based on 67 Conventions and 66 Recommendations, and it contained, in 324 pages, 10 Appendices embodying other standards, mostly laid down by committees set up by the I.L.O. itself. The present Code fills a volume of 1,181 pages, and the 100 Conventions and 92 Recommendations adopted by the Conference until 1951 inclusive are covered in 1,587 Articles. The Appendices, now 13 in number, are printed in a separate volume of 1,220 pages. These figures give some indication of the magnitude of the work done by the I.L.O. since 1939.

It is not, however, this quantitative increase which is the most outstanding feature of the new Code. The events which happened towards the end of the war and during the post-war period have to a large extent changed the character of the I.L.O. standards and also their legal and social significance. Of these events the one which was most in the public eye was perhaps the least influential. The Declaration of Philadelphia of 1944, like its counterpart, the Atlantic Charter, was no doubt a political pronouncement of some considerable weight, and, in an impalpable way, the emphatic re-statement of the 'aims and purposes' of the I.L.O. and 'of the principles which should inspire the policy of its members' may have had its effect on the policy of the Conference, the Governing Body and the Office. Indeed, in some of the Resolutions passed during the early post-war years by the Conference and by technical committees one can occasionally find a reference to the famous Declaration. But one may venture the guess that the great new departures in the work of the I.L.O., such as the much increased emphasis laid on trade union rights and on collective bargaining or the very much greater attention paid to what are now called 'non-metropolitan territories', might have occurred even if the I.L.O. had not, in 1944, proclaimed its faith in freedom of association and in the need for recognition of the right to bargain collectively, or if it had not made its own the magnificent Rooseveltian formula that 'poverty anywhere constitutes a danger to prosperity everywhere'.

Of far greater importance, especially to the lawyer, is the new Constitution of the I.L.O. adopted in 1946 (which is printed in full in the present work). The changes brought about by the transformation of the 1919 Constitution went far beyond the 'consequential' amendments necessitated by the disappearance of the League of Nations and by the desire to remove the traces of the original incorporation of the Constitution in the Treaty of Versailles. The decisive new Article 19 has given a new legal status to unratified Conventions, and, above all, to the Recommendations adopted by a two-thirds majority of the Conference. According to the new dispensation every member of the I.L.O. is under a legal obligation to inform the Director-General of the steps it has taken in order to secure the ratification of a Convention by its constitutionally competent authority. More important, perhaps, it must keep the Director-General informed with regard to its law and practice concerning matters dealt with in unratified Conventions and in Recommendations. The Preface to the present work indicates that, in the past, not sufficient weight may have been given to the I.L.O.'s Recommendations and that there was a tendency to rank Conventions and Recommendations 'in hierarchic order'.

This view of the relation between the two types of instruments is of course correct if the matter is considered from the point of view of their legal effect: a Convention gives rise to a legal obligation to implement its terms, a Recommendation does not. But it is wrong if these instruments are viewed, as they are in the present Code, not as sources of obligations in international law, but as standards of social policy. As such they have equal authority. The question whether the Conference should embody a standard in a Convention or in a Recommendation is not answered with reference to the social importance of the standard to be set up. It is solely determined by the need for striking a proper balance between rigidity and flexibility, and by considerations of expediency. Is the standard more likely to find universal or widespread acceptance if it is coupled with a legal obligation? Or is policy and legislation more likely to be influenced by norms which (without being mere programmes) leave it to the members to determine the precise method of action designed to carry them into effect? It is, in this connexion, of great significance, especially for countries like the United Kingdom, that emphasis is now being placed upon the possibility of implementing I.L.O. standards not by legislation but by collective bargaining. One feels that the tendency of the I.L.O. (manifest in several places of the present work) to influence collective bargaining practice as much as legislation is a matter of great, perhaps of growing, importance. Social sanctions may, in the field of labour, often do in one country what legal sanctions do in another, and to insist on legislation for the carrying out of the duties incumbent upon an I.L.O. member may often be futile, and sometimes retrograde.

From the point of view of the authors of the Code it must have been even more obvious under the Constitution of 1946 than it was under that of 1919 that they had to give equal weight to both types of standards, and that, in their treatment of the material, they had to draw the line not between Conventions and Recommendations but between both and those informal Resolutions of the Conference which have been developed *praeter legem* and which can be passed by simple majorities. They have rightly been left out of the Code, but appear in the First Appendix in the Second Volume. *Praeter legem* developments, i.e. administrative practices evolved by the Governing Body and by the Office, have in other respects made even more important contributions to the process of standard-making since the war. Much the most outstanding of these has been the establishment in 1945 of Industrial Committees 'with a view to providing within the framework of the I.L.O. specialised machinery to consider the problems of certain of the major industries of the world', such as coal-mining, inland transport, iron and steel, metal trades, textiles, building and civil engineering, petroleum, and chemical industries. Like the Joint Maritime Commission (which was established in the early days of the I.L.O. and continues to operate) and, up to a point, like the Permanent Agricultural Committee (which also existed before the war), these are committees of representatives of employers and workers. They differ fundamentally from the technical committees, which are composed of experts. (It is interesting that a technical committee dealing with salaried employees and professional workers was, in 1947, converted into a representative committee.) The Reports and Conclusions of these two types of committees appear separately in Appendices II and III. The industrial committees, the reviewer would venture to think, are a development of great potentialities. Are they not the nucleus of international collective bargaining machinery which, in the long run, may be almost indispensable as a supplement (or more than a supplement) to the legislative activities of the I.L.O.? May one, perhaps somewhat boldly, see in their work an 'education in international collective bargaining', comparable to the educative function which British Minimum Wage Legislation is exercising in national joint negotiation? Be this as it may, it is gratifying that the authors

of the volumes under review have given us a full conspectus of the work of these Committees.

In the 1939 Code the Book entitled 'Industrial Relations' covered two Articles in nine pages. It consisted of the Right of Association (Agriculture) Convention of 1921, which in a solitary operative Article made it incumbent upon members to secure to agricultural workers the same rights of association and combination as to industrial workers (whatever these may have been) and to repeal statutory and other provisions restricting such rights in the case of those engaged in agriculture. True, the authors of the 1939 Code used this meagre provision as a pretext for giving us in their annotations a most comprehensive survey of the I.L.O.'s activities regarding freedom of association and of collective bargaining, together with a full bibliography of I.L.O. material. Nevertheless, no one surveying the legislative activities of the I.L.O. in this decisive sphere can have failed to sense a keen disappointment at the inability of the I.L.O. to create standards of conduct in industrial relations. Here the war, the post-war development, and, one may assume, the New Deal, have produced a revolution. In the present work Industrial Relations are covered in thirty-seven Articles, dealing with Freedom of Association, with the Right to Organise and to Bargain Collectively, with Collective Agreements, and with Conciliation and Arbitration. The question of co-operation at the level of the undertaking was still pending when the Code was completed. The Code thus reflects the adoption of the Convention of 1948, which protects the freedom to associate, and of that of 1949, which enshrines the right of collective bargaining, as well as the Recommendations of 1951, which regulate the effect of collective agreements and the processes of conciliation and arbitration. But this part of the Code must be read in conjunction with other parts, embodying the Labour Clauses (Public Contracts) Convention and Recommendation of 1949 and the Minimum Wage Conventions and Recommendations of 1928 and of 1951. All these are designed to create substitutes for, and inducements towards, collective bargaining. The standard of legislation required by the 1948 and 1949 Conventions on freedom of association and on the right to bargain collectively is high. The 1949 Right to Organise and Collective Bargaining Convention protects the worker against many of those measures on the part of employers which, in America, are called 'unfair labour practices', and in particular makes it incumbent on I.L.O. members to prevent employment being subject to the condition that the worker shall not join a union or relinquish union membership and also to prevent employer interference with workers' organizations, and vice versa. The United Kingdom ratified the Convention in June 1950, but no step has so far been taken to pass the requisite legislation, and recent events, which are in everybody's memory, show that, in this respect, not only the law but also the practice falls short of that which this country has undertaken to adopt. What is more important in the present context is that these Conventions permit the I.L.O. to develop an administrative practice for the effective enforcement of trade union rights.

Within the framework of a review one can only mention some of the other prominent features of this Code. The development of regional standards, especially for non-metropolitan territories, has not only led to a great expansion of the relevant Appendices but also to a complete transformation of the Book of the Code, which used to be called 'Standards of Colonial Labour Policy' and now bears the title 'Social Policy in Non-Metropolitan Territories'. The old Book, which appeared under the heading 'Social Insurance', introduces itself now as 'Social Security', and it has been so much expanded both in subject-matter and in size as to be hardly recognizable. Medical Care appears as part of it, but the great principle that 'the medical care service should cover all members of the community, whether or not they are gainfully employed', together

with the remaining provisions on this subject, are not embodied in a Convention but in a Recommendation. This is a good example to illustrate the usefulness of this type of instrument when dealing with a matter in which strong vested interests in some parts of the world oppose the adoption of standards deemed by the I.L.O., i.e. by a two-thirds majority of its Conference, to be required in the interest of social progress.

The annotations to the Articles of the Code are one of the principal features of this work as they were of its predecessor. Their arrangement has been improved by the device of an Introductory Note at the beginning of each Book, which contains bibliographical and other information referring to the Book as a whole. A truly gigantic amount of work must have gone into the preparation of the Annotations with their ample bibliographies of I.L.O. publications, their copious references to the *travaux préparatoires* and their careful digesting of interpretations of Conventions by the Office itself and also occasionally by municipal courts. The Notes are rendered even more useful by the Indices of Interpretations and of Comparative Notes, i.e. Notes comparing the various Conventions and Recommendations, at the end of the Second Volume. Nor should the List of Bilateral and Plurilateral International Agreements regarding Labour Questions (Appendix XII) remain unmentioned.

The Code provides a systematic presentation of international standards of conduct in a vital field which is perhaps without its equal anywhere. In the Explanatory Note at the beginning (which contains a great deal of interesting observations on problems of international law, e.g. the effect of state succession, of war, and of withdrawals from the I.L.O. on existing obligations, and the problem of ratification with reservation), the authors anticipate 'that a stage may ultimately be reached in the development of international labour standards when it will become desirable to replace a substantial number of the existing instruments by a revised consolidation of them approved by the Conference'. That day may be far off. As long as it has not arrived, it must be difficult for anyone interested in social policy or labour law to imagine what life would be like without the Ariadne thread with which the authors of the Code guide his step through the labyrinth of I.L.O. documents and literature. Mr. C. Wilfred Jenks, Assistant Director-General and Legal Adviser to the I.L.O., and his collaborators are to be congratulated on a magnificent piece of work. With this expression of gratitude we cannot help combining that of the hope and expectation that their labours are not finished. We have had a 1939 Code and a 1951 Code. Soon we shall ask for more. O. KAHN-FREUND

Principles of International Law. By HANS KELSEN. New York: Reinhart & Co. 1952. xvi+461 pp. $5.

Any contribution by Professor Kelsen to international law is always welcome. This certainly applies to the book under review. It represents an attempt—which must be regarded as wholly successful—to apply to international law, in an introductory textbook not necessarily limited to specialists, many of Professor Kelsen's basic doctrines in the field of jurisprudence. In preparing this book the author has drawn on many of his previous writings on international law, but he has avoided the danger of putting before the reader a mere compilation of fragments. The very arrangement of the book is stimulating in its boldness and unorthodoxy. Thus, after a discussion of the nature of international law and the question whether it is 'law' in the true sense of the term, the author examines in detail, under the title 'Personal Sphere of Validity of International Law', the question of subjects of international law and, under the title 'Material Sphere of International Law', the problem of domestic jurisdiction. The third part is entitled, in a manner perhaps likely to give rise to controversy, 'The Essential

Function of International Law: The Determination of the Spheres of Validity of the National Legal Orders'—for there is room for the view that the essential function of international law can properly be conceived in a less formal manner. Within that framework the author discusses such matters as state territory; exterritoriality and exemption of foreign states from jurisdiction (under 'Determination of the Personal Sphere of Validity of the National Legal Order); nationals and their protection abroad (under 'Material Sphere of Validity'); and recognition and succession of states (under 'The Determination of the Temporal Sphere of Validity of the National Legal Order'). In Part IV, entitled 'Creation and Application of International Law', Professor Kelsen surveys the sources of international law, in particular treaties, and the settlement of disputes. In the last Part the author examines some theoretical aspects of the relation of international and national law. By way of an interesting modification of the purely doctrinal method of approach Professor Kelsen has added numerous references to judicial decisions, of which he gives a detailed account—mainly on the basis of the *Annual Digest and Reports of Public International Law Cases*.

The author of this book is in no need of flattery and the present review may therefore usefully be devoted to drawing attention to some of the views of the distinguished author which international lawyers may find difficult to accept. Thus, for the reason that international law obliges states to prevent the commission of certain acts injurious to foreign states, he asserts that such acts are violations of international law on the part of individuals. Among such acts he includes attempts directed against the territorial integrity of foreign states or intended to overthrow their legitimate governments (p. 126). This for most international lawyers is a novelty. Thus it is doubtful whether, apart from hostile expeditions, international law obliges states to prevent their nationals from taking part in revolutionary activities against foreign states. It certainly imposes no such obligation upon individuals—in relation either to their own state or to foreign states. Revolution may be treason in the contemplation of the municipal law of the state: it is not a crime according to international law. In his treatment of espionage the learned author finds it possible to combine the controversial suggestion that spies violate a direct prohibition of international law with the view that the latter imposes upon states no obligation to refrain from resorting to the weapon of espionage. This is so although 'if there is a rule of general international law authorizing states to punish individuals for having performed certain acts determined by international law, then international law forbids these acts' (p. 131).

While these views may give rise to questions in the realm of doctrine, doubts of a much more serious nature arise in connexion with Professor Kelsen's treatment of war crimes. He admits that, as in the case of any other violation of international law, there is individual responsibility for war crimes. However, in his view this principle does not apply to war crimes committed 'as an act of State'. Thus if a military commander violates a rule of war on his own initiative, he is individually responsible both to his own state and to the enemy into whose power he has fallen (p. 131); he is not responsible if his act is imputable to his state. It may be extremely difficult to follow this line of reasoning, so alien not only to international practice but also to what many have believed to be the fundamental tenets of Professor Kelsen's teaching. Who and what is the 'state', as distinguished from the individuals who compose and who govern it, to which a war crime can be imputed? In what circumstances does a commander of an army commit a war crime for which he is individually responsible—by, for instance, ordering a wholesale massacre of hostages or ordering general devastation unrelated to military necessity? Clearly in thus acting he acts as an organ of the state even if

he acts 'on his own initiative'. The view propounded by Professor Kelsen would seem to amount, in effect, to saying that wherever the commander fails to obtain the authorization of his state—which may mean the authorization of a higher commander acting, once more, not upon his own initiative—he is individually liable. The same applies to any subordinate member of the armed forces; unless he acts for the purpose of satisfying private lust or gain, he clearly acts as an organ of his state. When the commander of a submarine, after having sunk an enemy merchant vessel, orders, with the object of ensuring the safety of the submarine and her crew, the killing of the survivors of the destroyed vessel, does he act as a private individual or is his act imputable to his state and thus removed from the consequences of individual responsibility? He has clearly acted upon his own initiative—military commanders in war-time do not, in the stress of battle, act invariably by reference to instructions of the central government—and in Professor Kelsen's view he would be individually responsible. Yet on any common-sense view the commander acts in such cases as an organ of the state. In fact, unless the entire reasoning of the distinguished writer amounts to an affirmation of an unusual formula of superior orders as a justification of war crimes, it is not easy to see what is its purpose. But Professor Kelsen expressly discards that possibility (at p. 136): 'From the point of view of general international law, the difference between an act performed at superior command and the act performed on the . . . initiative of the acting individual is irrelevant. Only the question whether the act is or is not an act of state is decisive. The act performed at superior command may or may not be an act of state. It is not an act of state if the command is not an act of state' (p. 136). We are not told what is an act of state. Apparently it is an act which is not done on the actor's initiative or even the initiative of the person giving the command. It must be an act imputable to the state. We are not told what is an act imputable to the state. But we are informed that the Charter of the International Military Tribunal constitutes a piece of retroactive legislation in so far as it provided for the punishment of ordinary war crimes if these constituted an act of state. The unavoidable implication is that the war crime of murdering millions of civilians in occupied territory entailed no individual responsibility upon any one seeing that, to all appearance, it was an act of the German National-Socialist State. If the Government had ordered the slaughter of all prisoners of war captured by Germany, can it be seriously contended that such act would not have entailed individual criminal responsibility upon the persons ordering and executing it?

There are other matters of substance presented in this book which invite controversy. Thus with regard to paragraph 7 of Article 2 of the Charter Professor Kelsen compares that provision with the corresponding Article of the Covenant of the League and expresses the view that, having regard to the replacement of the word 'solely' by the word 'essentially' and the omission of the reference to international law, that paragraph 'has the consequence that even a subject which is regulated by international law, for instance, a matter with respect to which there exists an obligation imposed upon a state by a treaty, may be declared as being "essentially"—though not "solely" and not "by international law"—within the domestic jurisdiction' (p. 200). He admits that this is 'certainly a more than paradoxical result', but is apparently content to consider it to be a correct interpretation of the Charter. However, it is possible that the paradox does not follow inescapably from the Charter but is inherent in a method of interpretation which must result in extracting from the Charter all possible ineffectiveness. There is hardly a commentator who has put such a construction upon the Charter. In no case has the special pleading of governments challenging the jurisdiction of the United Nations gone to the length of asserting this extreme interpretation. On the other hand,

with regard to the question whether the Articles of the Charter relating to human rights constitute a legal obligation binding upon the Members, Professor Kelsen's view—which denies such character to the provisions of the Charter—is shared by writers of authority and by the majority of governments. But the argument which he advances in support of that view is unduly simple and not easily acceptable. That argument consists in the submission that no legal rights can be deemed to have been conferred upon individuals in this respect—and no corresponding legal obligations imposed upon states—seeing that the Charter contains no provisions conferring upon individuals the right of recourse to international tribunals and imposing upon Members of the United Nations the duty to comply with the decisions of such tribunals. However, it is generally recognized that, in the international sphere, the legal obligations of states are not dependent upon their acceptance of a duty to submit to the compulsory jurisdiction of tribunals in respect of these obligations. The fact that individuals cannot enforce claims before international tribunals in their own right does not mean that the subject matter of the rights in question does not constitute legal duties. Such duties may be capable of judicial enforcement by other states. Thus the provisions of the Minorities Treaties undoubtedly imposed upon the states in question legal obligations judicially enforceable in the last resort by the Contracting Parties, although no such right was conferred upon the individual members of the Minorities.

On some questions of a more factual character Professor Kelsen's statement of the law probably requires substantial qualification. This applies conspicuously to his brief treatment of territorial waters. Thus it is doubtful whether 'the three-mile rule was generally recognized during the nineteenth and the beginning of the twentieth century *only in so far as it determined a minimum distance*'[1] and whether 'nowadays, the three-mile rule is certainly obsolete' (p. 220). It is not clear whether the latter proposition is intended as a statement of the existing law or as a reference to the bases which underlie it. At the end of the nineteenth century there was hardly a state in existence which was prepared to put forward, on the basis of law, a claim to a maritime belt under three or (in some isolated cases) four miles. There may also be some danger in laying down, by way of an apparent qualification of the statement that the three-miles rule is obsolete, that territorial waters 'do not extend beyond that part of the sea over which the littoral state can exercise effective control' (ibid.). The present range of artillery, warships, and aircraft enable the littoral state to exercise effective control over the sea at a distance of fifty miles or more. The so-called long-distance blockade was considered to be effective although the warships of the belligerent were stationed several hundreds of miles off the coast of the blockaded state. It is the test of effectiveness which is obsolete and which, unless so treated, may become a threat to the principle of the freedom of the sea.

Nor is it easy to regard as fully acceptable Professor Kelsen's treatment of the problem involved in the clause *rebus sic stantibus*. He questions the relevance of a vital change in circumstances as a factor in the continued validity of the treaty, on two grounds: the first is the absence of an impartial authority to determine whether a change of circumstances of that nature has taken place. But the absence of such machinery is not an unavoidable phenomenon of nature. The fact is that international tribunals have adjudicated upon a plea of this kind and that there is no reason why they should not do so in the exercise of the normal jurisdiction conferred upon them by the parties. It is reasonable to lay down as a rule of law that a state is entitled to invoke a vital change of circumstances only if it agrees, in case of a dispute, to submit the determination of that question to an impartial tribunal. But it may be difficult to assent to the proposition that it is not entitled to invoke a vital change of circumstances even if it is willing to

[1] Italics are the reviewer's.

abide by an impartial determination of the issue. Professor Kelsen's second argument on the question is that it is the function of law generally and of treaties in particular to ensure the stability of international relations in changing circumstances and that the clause *rebus sic stantibus* is in opposition to that function. The rival—but not irreconcilable—purposes of the law as an instrument both of stability and of change have been the subject of searching discussion among international lawyers since the First World War. They have considered that justice cannot be done to a complex problem by attaching decisive importance to one only of the two basic aspects of the issue involved. Neither is it easy to accept Professor Kelsen's assessment of the existing practice, judicial and other, in the matter. His statement that 'no international tribunal has, until now, unreservedly confirmed the existence of this rule', although not inaccurate in itself, fails to bring out the true position. No international tribunal has ever rejected the doctrine *rebus sic stantibus*; many have applied it; others have declined to apply it in the circumstances of the case before them, but have nevertheless recognized its validity in principle.

There are other aspects of Professor Kelsen's account of the law of treaties which call for comment. The difficult question of the relevance of constitutional limitations in relation to the treaty-making power is treated in an inconclusive manner and one which perhaps unduly simplifies a complex situation. In discussing the legality of treaties imposed by force the learned author views the subject from the point of view of traditional international law. The only concession which he is prepared to make to the developments during the last quarter of a century, as expressed in the Covenant of the League of Nations, in the General Treaty for the Renunciation of War, in the Charter of the United Nations, and in the numerous treaties and pronouncements concerning non-recognition of treaties imposed by force, is to admit that organs of the United Nations 'may consider a treaty imposed by force as null or annullable' (p. 326).

It is not necessary for an admirer of Professor Kelsen—and the reviewer counts himself among them—to claim that the *Principles of International Law* occupy as high a position among Professor Kelsen's contributions as those of his other writings which have so justly secured for him an enduring place in legal philosophy. This fact does not diminish the value of the book as a model of precision and clarity and as a stimulus to thought. If for no other reason, this Introduction to International Law is an outstanding and fully successful attempt—of which there are but few—to present the entirety of the international law of peace within the framework of a jurisprudential system. Moreover, with regard to some of the questions raised in the present review, it is probable that the author would not be at a loss to suggest an answer which many might find convincing. Thus his views on individual responsibility for war crimes may well have been influenced by doubts as to whether what some considered to be retroactive punishment of the vanquished by the victors was conducive to the authority of international law. His disinclination to accept the doctrine *rebus sic stantibus* as part of international law may be grounded in the conviction, which is entitled to respect, that in a deficiently organized legal society stability is more important than change. And the exaggerations of his interpretation of Article 2 (7) and of other Articles of the Charter may be prompted not by any leaning towards the dogma of unrestricted sovereignty—the author of *Das Problem der Souveränität und Die Theorie des Völkerrechts* is surely above that reproach—but by belief in the desirability of a Charter that should be a better piece of draftsmanship. For that reason it would be deceptive and inaccurate to regard this book as expressive of a tendency to a questionable branch of realistic relativism.

H. LAUTERPACHT

Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts in den Jahren 1945–1949. Edited by A. N. MAKAROV. Sonderveröffentlichung der Zeitschrift für Ausländisches und Internationales Privatrecht. Berlin: Walter de Gruyter & Co.; Tübingen: J. C. B. Mohr (Paul Siebeck). 1952. xi+231 pp. (DM. 32).

With this volume, edited by Professor Makarov, the Max-Planck Institute for Foreign and Private International Law has resumed its admirable practice of publishing periodically all decisions in matters of private international law given by German courts. The aim is to make the collection as comprehensive as possible, and many unreported cases are included. The present volume reflects clearly the general problems which confronted the German public in the years after the collapse. Litigation involving the private international law of contract and succession did not arise. On the other hand, the domestic troubles of refugees and displaced persons occupied the courts on an unprecedented scale. In a few cases, confiscatory measures taken by Czechoslovakia were challenged. Practically all the cases disclose the fact that in present times private and public international law are no longer distinct compartments. They impinge upon each other more or less imperceptibly and are liable to create situations of considerable difficulty. German courts have faced these situations resolutely, but have not always been able to give full credit to the finer shades of this interrelation. Professor Makarov has edited the collection with his usual skill and erudition. K. LIPSTEIN

History of the Second World War. Volume I: *The Economic Blockade.* By W. N. MEDLICOTT. London: H.M. Stationery Office and Longmans, Green & Co. 1952. xvi+732 pp. 35*s*.

The purpose of this important volume, based largely on hitherto unpublished papers in the archives of the British Foreign Office and Ministry of Economic Warfare, is to describe the operation of the machinery created during the Second World War for checking the attempts in neutral countries to trade with Germany. It also surveys in detail the negotiations in which Great Britain attempted to persuade the neutral states to limit or suspend their trade with her enemies, and the results of these negotiations. While the volume is thus primarily of interest for the historian of the Second World War it constitutes, indirectly, a major contribution to the study of the law of war at sea. Professor Medlicott, who repeatedly disclaims any expert knowledge of international law, may be assured that he has placed international lawyers under a heavy obligation to himself, and that no author of a serious textbook of international law on the subject will be in a position to neglect this authoritative account, presented so thoroughly and in such readable fashion, of the practice of the Second World War. Thus he will find particularly instructive the account, in Chapter X, of the development of neutrality in the United States and in American States generally. The description, in Chapters II and XIII, of the operation of compulsory navicerts and ship's warrants is particularly instructive and sheds new light on a device which rendered obsolete much of the controversy relating to the operation of the law of blockade and of visit and search. Professor Medlicott's treatment of these and other complicated questions of the law of the sea is refreshingly lucid, and it is only seldom—as in his account of the operation of the Mannheim Convention relating to the Central Rhine Commission (p. 211)—that the reader is left in some doubt as to the legal issue involved. On the other hand, he will appreciate the detailed information on such questions as the attitude of the

British Government to the proposed sinking of neutral vessels not accompanied by navicerts. The legal advisers to the Foreign Office and the Ministry of Economic Warfare tendered advice to the effect that while a plain announcement that neutral ships without navicerts would be liable to be sunk would not be justified under existing principles of international law or any admissible extension of them, an announcement that they 'would be liable after seizure to be sent in or sunk according to circumstances' would not necessarily be inconsistent with international law (p. 434). In the end the War Cabinet decided not to adopt the policy of sinking neutral vessels.

The entire volume is a major contribution to the question of the degree of the continued relevance of the distinction between combatants and non-combatants. The definition, officially adopted and reproduced in full by the author, of the notion of economic warfare is particularly instructive in this connexion. H. L.

International Law. By L. OPPENHEIM. Volume II: *Disputes, War, and Neutrality*. Edited by H. LAUTERPACHT. 7th edition, 1952. London: Longmans, Green & Co. liii+941 pp. £4.

Oppenheim's International Law, as edited and now largely re-written by Professor Lauterpacht, is so well known to the readers of this *Year Book* that they will not expect a reviewer of the seventh edition of the second volume to praise the qualities or to emphasize the indispensability of what may justly be described as the leading treatise in the field. The reader will be better served if his attention is drawn to some of the new features of this particular edition rather than to the familiar characteristics of an established work.

When the sixth, revised, edition appeared in 1944 Professor Lauterpacht explained (Preface, p. v) that he had to delay the systematic overhauling of the volume in the light of the practice of the belligerents during the Second World War 'until the available evidence, assessed in the proper perspective, renders the task of revision both complete and reliable. Some years must elapse before this will be possible'. By November 1951, when the present volume was completed, it was clear that the Editor's task had been considerably extended. The law had been provided with new foundations creating new problems. It thus became necessary to add over eighty paragraphs and more than 180 pages to the volume. Moreover, it was necessary for the Editor to take into account much new material, to subject the old text to painstaking and sometimes radical revision, to delete obsolete parts and to deal with many minor questions which have arisen over the years. The result is a book which has no rival in its field.

While it is impossible to enumerate all the changes incorporated in this volume, it may not be inappropriate to comment upon the principles which have guided Professor Lauterpacht's approach to the four topics of paramount significance treated for the first time and deservedly granted pride of place in this volume, viz. the creation of the United Nations; the possibility of atomic warfare; the conclusion of the Geneva Conventions of 1949; the establishment of, and the decisions rendered by, the International Military Tribunal at Nuremberg and other war crimes tribunals.

The Charter of the United Nations has, of course, affected this volume in numerous respects, but the settlement of disputes under the Charter (pp. 97 ff.), the enforcement provisions of the Charter (pp. 151 ff.) and its influence upon the law of neutrality (pp. 645 ff.) are probably the principal aspects which fell to be discussed. The pages devoted to the International Court of Justice did not, in view of the similarity of the Court to its predecessor, require more than revision, though it should be noted that

Professor Lauterpacht has added a pregnant sentence of hope with which many will agree (p. 71):

'A substantial part of International Law is now covered by the decisions of the Court. The usefulness of that contribution will be considerably enhanced when the relative brevity of its pronouncements—a brevity due, in some measure, to the difficulty of achieving agreed statements of the law in a body as large as the Court—gives place to a reasoned elaboration of its decisions by reference to international doctrine and to decisions of courts in the international and municipal spheres.'

Another sentence on the law of the United Nations which merits special mention is that dealing with the question whether collective enforcement by hostilities is in international law tantamount to war. Professor Lauterpacht answers this question in the negative (p. 224):

'It is consonant with the dignity and the purpose of the collective enforcement of the basic instrument of organised international society that it should rank in a category different from war as traditionally understood in International Law.'

That sentence is quoted here, not on account of its specific content (which in the last resort may conceal a question of terminology), but because it illustrates the attitude of mind which pervades the whole of the volume: a strong sense of the moral foundations and the dignity of law and of the idealistic approach which international law requires. The placid indifference or even cynical contempt with which international law is frequently regarded find no room in this volume.

The advent of atomic warfare faced the Editor with the problem of assessing its legality. He finds it difficult to say 'whether an explicit prohibition of the use of the atomic weapon in warfare would be merely declaratory of existing principles of International Law' (p. 351). But, without referring to the use of the atom bomb against Japan, Professor Lauterpacht emphasizes that recourse to the atom bomb may be justified not only as a reprisal, but also 'against an enemy who violates rules of the law of war on a scale so vast as to put himself altogether outside the orbit of considerations of humanity and compassion'. In a footnote he adds a remark which might well have found a place in the text: where an aggressor threatens 'ultimate values of society' the victim may be entitled to exercise 'the supreme right of self-preservation'.

The Geneva Conventions of 1949, concluded in the light of the experience of the Second World War and, in particular, of the indescribable things done by Germany during it, are fully considered in this work. Although, as the Editor realizes, they have so far been ratified by some fifteen states only, they are likely in the ultimate to become binding upon the great majority of states. This is in itself sufficient justification for the decision which Professor Lauterpacht had to make upon one of the fundamental questions that confronted him, namely, the weight to be attached to the practice of war crimes tribunals. He has treated their verdicts as judicial precedents. He was right in so doing. Germany's conduct in two world wars, briefly but effectively summarized in a special paragraph (pp. 448 ff.), is now frequently allowed to sink into oblivion, but it is in no sense mitigated by what others may have done or may now be doing. It would in effect have been excused if Oppenheim had not recorded it, not merely as a matter of history, but as a matter of judicially condemned crime. In certain circles it has become almost fashionable to decry the contributions which the war crimes tribunals have made to international law, and Professor Lauterpacht is likely to be criticized for his determination to make full use of what is to some extent a new departure in judicial activities.

It is submitted, however, that he has impressively exposed the ephemeral character of such criticism by words which merit quotation (Preface, p. v):

'The stature of those tribunals is bound to grow with the passage of time and their judgments will be increasingly regarded as a weighty contribution to International Law and justice. These judgments—perhaps more than anything else—give a complexion of reality to any attempt at a scientific exposition of the law of war, which never before in history was so widely and so ruthlessly disregarded as in the Second World War. In that perspective the occasional criticisms of these courts as having been tribunals set up by the victor acting as judge in his own cause must be deemed to be of limited importance.'

At the same time, however, Professor Lauterpacht is by no means indifferent to the desirability of reforms by the establishment of organs of international criminal jurisdiction (pp. 584–6).

This reviewer would like to mention many other points of interest, particularly points of technical legal argument the importance of which is frequently considerable, but which stand in the shadow of the broad issues that have been referred to. But not even a prolonged discussion of details could do justice to a work which one cannot lay down without an expression of genuine appreciation and respect. F. A. MANN

La Communauté européenne du charbon et de l'acier. By PAUL REUTER. Paris: Librairie Générale de droit et de jurisprudence. R. Pichon et R. Durand Anzias. 320 pp.

The appearance of this important and authoritative work on one of the most interesting experiments of our time—the Schuman Plan—is much to be welcomed, particularly from an author so well placed as is Professor Reuter to expound its character and special features. These are, legally speaking, considerable, both in number and in prominence, for the constitution of the European Coal and Steel Community gives rise to a whole range of legal problems which, if neither strictly new in theory nor entirely unprecedented in fact, can nevertheless be said to be both new and unprecedented in the form and in the degree of intensity and complexity with which they occur in relation to the Community. To cite a recent article by Mr. Raymond Vernon in *American Journal of International Law* (vol. 47, No. 2, April 1953):

'The easiest way to miss the legal significance of the Schuman Plan and the Treaty to which it gave rise is to study it in terms of familiar legal concepts. Like most really historical documents, the Treaty . . . though conditioned by the legal concepts with which its drafters were familiar, makes history precisely because it takes a step beyond those traditional concepts.'

In what does this step consist? In paragraphs 140–3 of his work Professor Reuter discusses the question of the general juridical character of the Community, and he shows, here and elsewhere (see in particular paragraphs 33–44 and 95–139), and with a wealth of illustration, that its distinctive feature consists in the fact that it is a 'supranational' and not merely an *inter*national entity. Normally, states, in setting up an international organization, do not go beyond limiting their own freedom of action or sovereignty in certain directions, agreeing themselves to behave in a particular way, and (in some cases) undertaking that they will carry out the decisions of one or more competent organs of the entity. But it is still the component states who so behave, who carry out the decisions, &c. The entity itself has no direct power of action; it can only act on, by, or through the member states. This is broadly true even of the United

Nations (except perhaps—potentially—in the military sphere, but for various reasons the relevant provisions have never been able to operate). It was for this reason that the International Court of Justice in the case of *Reparation for Injuries Suffered in the Service of the United Nations*, while ascribing to the United Nations Organization an international personality separate from and additional to that of the sum of its Members, added that this did not make it a 'Super-State'. The European Coal and Steel Community, however, if neither a state nor a super-state, is a supra-national entity of a type and on a scale scarcely known before in the international field; though, as Professor Reuter points out, certain institutions, such as the European Commission of the Danube, have exhibited similar characteristics in embryo.

What are these characteristics? It would be impossible to describe them fully here. But briefly, they consist in the fact that the principal organ of the Community, the 'High Authority' (which is made up of persons who, though nationals of member states, do not sit as representatives of their Governments) can not only take decisions which the Governments must carry out, whether they agree with them or not, but also decisions directly binding on industries, institutions, persons and undertakings in the territories of the member states, which such persons and entities must carry out even against the wishes of their Governments (who, if they actually forbade such action, would be acting in a manner contrary to the Treaty). The High Authority also has power to impose sanctions by way of fines and other penalties on private persons and institutions in the member states. In short, it is itself an organ with direct governmental powers operating in the territories of the member states and existing alongside their Governments, who have thus transferred to it by the Treaty the exercise of a part of their sovereign powers.

In such a situation, the possibilities of conflict are obvious, and the Treaty provides a careful system of checks and counter-checks through the operation of other organs—a Council of Ministers, an Assembly, and a Court. Yet the High Authority cannot be overridden in its own sphere except by the Court, though it can be influenced through the Council and the Assembly, and in other ways.

It is equally manifest that a situation of this kind must give rise to a host of legal and constitutional problems, large and small. These are very comprehensively dealt with by Professor Reuter. Suffice it to say here that on the 'internal' plane—that is to say, in the relations of the Community *inter se*, the position is somewhat similar to that of a federation of the states concerned for coal and steel purposes, with the High Authority —or more properly the Community—as the Federal Government, and the member states as constituent parts, retaining their functions in all matters not transferred to the Community. The legal problems that result are very like those that assail a federation, and essentially of the same order.

It is quite different in the 'external' sphere, i.e. in the relations between the Community and its members and the outer world. There the resemblance to a federation breaks down. A federation is, on the international plane, one single international entity acting through its federal Government. The Community consists of states each of which not only remains an international person in its own right, but also retains that personality even for coal and steel purposes, though with the High Authority perhaps added as a sort of additional quasi-international person. In short, the coal and steel affairs of the member states in relation to the outer world are still carried on by these states *plus* the Community (principally the High Authority).

It is easy to see what complications all this must lead to in the relations between the members and other states. It is only necessary to mention as an example the impossibility of formally reconciling the most-favoured-nation obligations of the various

member states with the privileged position they are bound to accord one another under the Treaty. For the steps taken to overcome this and other difficulties the reader must be referred to Professor Reuter's work itself.

In addition to the legal aspects, the book contains a very full and detailed description of the various organs of the Community, their powers, functions, and practice. There is always a danger that works on international organizations, written from a lawyer's standpoint, may stress matters of abstract interest at the cost of the substance. It is not the least of Professor Reuter's merits that he has steered an even course between the Scylla of over-simplification and the Charybdis of too great an elaboration. His work will be valued as a master-guide not only to the actual institutions of the Organization it treats of, but also to the solution of the legal and constitutional problems to which this type of entity (and it will surely not be the last) must inevitably give rise.

G. G. F.

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